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READINGS # 4.

IN THE

LAW OF REAL PROPERTY

AN ELEMENTARY COLLECTION OF
AUTHORITIES FOR STUDENTS

SELECTED AND EDITED

BY

GEORGE W. KIRCHWEY

Nash Professor of Law in Columbia University

NEW YORK
BAKER, VOORHIS & CO.

1900

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PREFACE.

THE collection herewith submitted has no more ambitious aim than to bring within the reach of students the necessary material for an understanding of the law of real property. It is not primarily a book of "sources," nor, strictly speaking, a compilation of authorities, but, as its title indicates, a series of carefully selected readings on the elements of property law, the several topics being treated by those who have—for the purposes of the student and within permissible limits of space—most clearly and adequately expounded them. The service which it seeks to render has for a hundred years been performed for the American student by the second book of Blackstone's immortal commentary on the common law, but a variety of causes—the development of the law since Blackstone's day, the rise of the new school of historical students of our law, and, perhaps, a diminishing reverence for great names of the past (other signs of which are not wanting *horis novissimis*)—have combined to render that work antiquated (in Lord Coke's sense of the term) and unavailable for use as an introduction to the law of real property.

That no one has arisen to do for us moderns what Blackstone did so well for our predecessors, is a commonplace of the law schools. A real introduction to the English and American law of land, which shall acquaint the student with the living sources of that law without leading him through the dreary waste of technicalities and obsolete doctrines

with which its course is encumbered, which shall deal with the law of real property as a vital thing, having actual relations to the life of the community and not as an artificial system, invented to fasten the yoke of feudalism on a free people and perpetuated to preserve a monopoly of injustice to conveyancers,—this is the great desideratum of our legal education. The editor of this collection has long contemplated the writing of such a book, not without a hope, however, that some more competent hand would render the service in more adequate fashion than he could expect to do. In the meantime, this collection of extracts from the writings of the masters of the law is offered to students. It will at least save them the labor of hunting through scores of volumes in search of the most authoritative and lucid expositions of the doctrines considered.

The gratitude of the editor is due to all those who have, by their generous contributions from their writings, made such a collection possible. He desires, however, to make particular acknowledgment of his indebtedness to Professor John C. Gray, of the Harvard Law School, whose ripe learning and indefatigable labors, not less than his stimulating example as a legal writer and teacher, have brought the scientific study of the law of real property within the reach of all earnest students.

COLUMBIA UNIVERSITY, February, 1900.

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READINGS

IN THE

LAW OF REAL PROPERTY.

BOOK I.

THE PLACE OF REAL PROPERTY IN THE COMMON LAW SYSTEM.

CHAPTER I.

CLASSIFICATION OF PROPERTY.

(a) The Natural Classification.

DIGBY, HIST. REAL PROP., App., § 1. The rights and their corresponding duties which form the matter of English private law are first to be divided into two great classes, differing from each other in respect of the persons on whom the duties, which correlate to the right, are incumbent. A person may have a right the essence of which consists in the fact that all other persons whatsoever are under a duty corresponding to the right; or he may have a right the essence of which consists in the fact that the corresponding duty is incumbent on some one or more determinate person or persons. An example of the first class of rights is the right of property which a person has in or over a piece of land or a herd of cattle. All other persons whatsoever are bound to abstain from acts injurious to his power of dealing as he

pleases with his own. In other words, he may enjoy, use, and, if he pleases, if the thing is perishable, use up, the thing which is the subject of the right, subject only to certain general limitations, and also to certain special limitations prevailing in particular cases, where his rights are limited by conflicting rights possessed by other persons over the same subject. Rights of this class have received the name of rights *in rem*, an expression which means, not rights over things, but rights available against all the world, *i.e.*, where a duty is incumbent on all persons whatsoever to abstain from acts injurious to the right.

Opposed to rights *in rem*, or rights available against all the world, is the other great class of rights, namely, rights which are available only against some particular or determinate person or persons. These are called rights *in personam*, which is an abridged expression for rights *in personam certam* or *determinatam*. The principal, though not in our law the only, sources of these rights are *contracts* and *injuries*. When one person has entered into a contract with another, as, for instance, when he is bound by a promise to pay money, to deliver goods on a certain day, not to carry on a trade within a given area, a legal tie is created as between these two parties, the one has a right against the other, the one is under a duty toward the other, and no third party or stranger to the contract shares either in the right or in the duty. So when any right, whether *in rem* or *in personam*, is violated, a new right *in personam* arises. If my right of excluding all persons from my house or field is violated by a trespasser, a new right as against that individual trespasser accrues to me, namely, a right to adopt the appropriate remedy provided by the law. So when a person is bound by contract to deliver goods on a future day, or not to carry on a trade within a given area, the breach of the contract gives rise in each case to new and distinct rights, rights to pursue the proper legal remedy against the wrongdoer. It will be seen at once that rights *in personam* comprise some of the most important branches of the law, but

they are here mentioned only to be excluded, since it is clearly not under that head that the law relating to land will be found.

The law dealing with rights *in rem* may be called—using the term “property” in a large sense—the law of property, or the law dealing with property-rights. The word “property” is used in so many senses as to be nearly useless for juristic purposes. One of its best known applications is where it is applied to any collection of rights *in rem*, as distinct from rights *in personam*. The Roman lawyers marked the difference between the two branches of law by the words *dominium* and *obligationes*. If the word “property” were not so ambiguous, one might venture to suggest that the “law of property,” or “of property rights,” should be substituted for the obscure expression *rights in rem*.

Rights *in rem* may be subdivided into two great classes in respect of their subjects. By the subject of a right is meant the thing, if any, over which the right is exercised. My house, horse, or watch is the subject of my right of property. There are, however, some rights *in rem* which cannot properly be said to have any subjects, or to be exercised over any definite things. These will be noticed presently.

The great distinction next to be mentioned between two classes of rights *in rem*, differing in respect of their subjects, is peculiar to English law and the systems derived from it. In Roman law and the systems to which it has given rise there is no such fundamental distinction between the law relating to land and the law relating to things movable, as to necessitate a separate treatment for each branch. It is otherwise in English law, and the outline of its history which has been given in the preceding chapters will account for this characteristic of our system.

The distinction therefore under consideration is between rights *in rem*, which have for their subject things real, that is to say, things immovable—in other words, land and all that is permanently affixed thereto; and rights *in rem*, which

have for their subject things personal or movable. Speaking generally, though not with entire accuracy, the former class of rights constitutes the matter of the law of "real property," the latter the matter of the law of "personal property." There is, however, one important class of rights over land,¹ . . . which belongs to the category of personal property.

There is further a miscellaneous class of rights *in rem* which cannot be said to be rights over land, or indeed to have any subjects at all, but which possess some characteristics common to rights over land. For instance, such of them as are descendible, devolve not, as is the case with personal property, to executors or administrators, but to heirs. These rights therefore are usually treated along with rights over land. Among the principal of this class of rights are *advowsons*—*advocationes*, or the right of presentation to an ecclesiastical benefice; and *franchises*—where "a royal privilege or branch of the king's prerogative is subsisting in the hands of a subject." For example, the rights to have "waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands" are franchises, which must rest on royal grant, or prescription which presupposes a grant. To this class, too, belong *dignities*, such as a peerage, which is the subject of grant by patent conferring the title with limitations similar to the limitations in an ordinary conveyance of land. Peerages may also be created by writ or royal summons to attend the house of peers; this, if acted upon, invests the person summoned with a dignity descendible to his heirs. Another instance of the class of rights in question is found in *offices* which are now seldom hereditary. An office tenable for life, such as a college fellowship, is considered a freehold interest. The class of rights under consideration is by Blackstone and others included under the class of *incorporeal hereditaments*. . . .

Rights over things movable, and rights which, though not over things movable or indeed over things at all, are yet

¹ The reference is to leasehold interests. See below, pp. 12-16.—ED.

classed with such rights, inasmuch as they are rights *in rem*, and, where they are descendible, devolve on executors or administrators (for example, patent rights, copyrights), lie beyond the scope of the present treatise.

MAINE, ANCIENT LAW, 273-277. The only *natural* classification of the objects of enjoyment, the only classification which corresponds with an essential difference in the subject-matter, is that which divides them into Movable and Immovable. Familiar as is this classification to jurisprudence, it was very slowly developed by Roman law, from which we inherit it, and was only finally adopted by it in its latest stage. The classifications of ancient law have sometimes a superficial resemblance to this. They occasionally divide property into categories, and place immovables in one of them; but then it is found that they either class along with immovables a number of objects which have no sort of relation with them, or else divorce them from various rights to which they have a close affinity. Thus, the *Res Mancipi* of Roman law included not only land but slaves, horses, and oxen. Scottish law ranks with land a certain class of securities, and Hindoo law associates it with slaves. English law, on the other hand, parts leases of land for years from other interests in the soil, and joins them to personalty under the name of chattels real. Moreover, the classifications of ancient law are classifications implying superiority and inferiority; while the distinction between movables and immovables, so long at least as it was confined to Roman jurisprudence, carried with it no suggestion whatever of a difference in dignity. The *Res Mancipi*, however, did certainly at first enjoy a precedence over the *Res Nec Mancipi*, as did heritable property in Scotland, and realty in England, over the personalty to which they were opposed. The lawyers of all systems have spared no pains in striving to refer these classifications to some intelligible principle; but the reasons of the severance must ever be vainly sought for in the philosophy of

law; they belong not to its philosophy, but to its history. The explanation which appears to cover the greatest number of instances is, that the objects of enjoyment honored above the rest were the forms of property known first and earliest to each particular community, and dignified therefore emphatically with the designation of property. On the other hand, the articles not enumerated among the favored objects seem to have been placed on a lower standing, because the knowledge of their value was posterior to the epoch at which the catalogue of superior property was settled. They were at first unknown, rare, limited in their uses, or else regarded as mere appendages to the privileged objects. Thus, though the Roman *Res Mancipi* included a number of movable articles of great value, still the most costly jewels were never allowed to take rank as *Res Mancipi*, because they were unknown to the early Romans. In the same way chattels real in England are said to have been degraded to the footing of personalty, from the infrequency and valuelessness of such estates under the feudal land-law. But the grand point of interest is the continued degradation of these commodities when their importance had increased and their number had multiplied. Why were they not successively included among the favored objects of enjoyment? One reason is found in the stubbornness with which ancient law adheres to its classifications. It is a characteristic both of uneducated minds and of early societies, that they are little able to conceive a general rule apart from the particular applications of it with which they are practically familiar. They cannot dissociate a general term or maxim from the special examples which meet them in daily experience; and in this way the designation covering the best-known forms of property is denied to articles which exactly resemble them in being objects of enjoyment and subjects of right. But to these influences, which exert peculiar force in a subject-matter so stable as that of law, are afterward added others more consistent with progress in enlightenment and in the conceptions of general expediency. Courts and lawyers be-

come at last alive to the inconvenience of the embarrassing formalities required for the transfer, recovery, or devolution of the favored commodities, and grow unwilling to fetter the newer descriptions of property with the technical trammels which characterized the infancy of law. Hence arises a disposition to keep these last on a lower grade in the arrangements of jurisprudence, and to permit their transfer by simpler processes than those which, in archaic conveyances, serve as stumbling-blocks to good faith and stepping-stones to fraud. We are perhaps in some danger of under-rating the inconveniences of the ancient modes of transfer. Our instruments of conveyance are written, so that their language, well pondered by the professional draftsman, is rarely defective in accuracy. But an ancient conveyance was not written, but acted. Gestures and words took the place of written technical phraseology, and any formula mispronounced, or symbolical act omitted, would have vitiated the proceeding as fatally as a material mistake in stating the uses or setting out the remainders would, two hundred years ago, have vitiated an English deed. Indeed, the mischiefs of the archaic ceremonial are even thus only half stated. So long as elaborate conveyances, written or acted, are required for the alienation of land alone, the chances of mistake are not considerable in the transfer of a description of property which is seldom got rid of with much precipitation. But the higher class of property in the ancient world comprised not only land, but several of the commonest and several of the most valuable movables. When once the wheels of society had begun to move quickly, there must have been immense inconvenience in demanding a highly intricate form of transfer for a horse or an ox, or for the most costly chattel of the Old World—the Slave. Such commodities must have been constantly and even ordinarily conveyed with incomplete forms, and held, therefore, under imperfect titles.

Id., 282-284. As I before explained, the allodial form of property was entirely lost in the feudal, and when the consolidation of feudalism was once completed, there was practically

but one distinction left standing of all those which had been known to the western world—the distinction between land and goods, immovables and movables. Externally this distinction was the same with that which Roman law had finally accepted, but the law of the middle ages differed from that of Rome in distinctly considering immovable property to be more dignified than movable. Yet this one sample is enough to show the importance of the class of expedients to which it belongs. In all the countries governed by systems based on the French codes, that is, through much the greatest part, of the Continent of Europe, the law of movables, which was always Roman law, has superseded and annulled the feudal law of land. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly accomplished. Our own, too, it may be added, is the only considerable European country in which the separation of movables from immovables has been somewhat disturbed by the same influences which caused the ancient classifications to depart from the only one which is countenanced by nature. In the main, the English distinction has been between land and goods; but a certain class of goods have gone as heirlooms with the land, and a certain description of interests in land have from historical causes been ranked with personalty. This is not the only instance in which English jurisprudence, standing apart from the main current of legal modification, has reproduced phenomena of archaic law.

(b) *The Common Law Classification.*

BRACTON, 101, 102. It has been said above what is an action and in what ways it arises out of obligations: now we must see in what way it is divided. And it is to be known that of all actions or pleas (to use these terms as equivalent) this is the first division, that some are real and others personal, and some are mixed. . . .

But actions for a thing are those which are allowed against

a possessor of it who possesses it in his own name from whatever cause, and not in the name of another person because he has the thing or possesses it, so that he may restore it or name the person who has control over it, as if any one claims from another a certain thing, some estate or land, and contends that he has the right over it, and therefore is the owner, and he sues for that thing, and not its price, nor its value, nor an equivalent of the same kind, and so it is a corporeal immovable thing, which is claimed for whatever cause from some one, who is not bound by any personal right. . . .

We have discussed above if the thing be immovable which is claimed, now when the thing claimed is movable, as a lion, an ox, or an ass, a robe, or anything else which consists in weight or in measure. It appears on first glance that the action or plea ought to be for the thing, as well as against the person, on the ground that a certain thing is claimed, and that the holder of it is bound to restore the thing claimed, but in truth [the action] will be against the person only, because he from whom the thing is claimed is not bound precisely to restore the thing itself, but disjunctively either the thing itself or its price, and upon paying the price he is released, whether the thing itself appears or not. And therefore if anybody claims a movable, from whatever cause it may have been carried off or lent, he ought in his action to define the price, and so to state his action: I, so and so, sue that so and so restore to me such a thing of such a price; or, I complain that so and so unjustly detains from me or has robbed me of such a thing of such a price, otherwise the claim for a movable will not avail if the price of it be not stated. The same thing will happen if movable things are claimed which consist in weight, or number, or measure, like bullion or money or barley, or things which consist of liquid, as wine or oil, in which case, if things of such sort are claimed, it will be sufficient if the defendant restores so much as is of the same weight or number or kind or measure, and hence, because he is not compelled to restore pre-

cisely the thing itself which is claimed, there will be an action against the person, since the defendant may be released by payment of an equivalent.

WILLIAMS, REAL PROP. (17th ed.), 23. The terms *real* and *personal* were first applied to actions; and were afterward extended to things and property with the meanings which they had acquired in connection with actions. Actions in English law were classified as being either real, personal, or mixed. The term real action is simply a translation of the expression *actio realis* used by early writers on English law as equivalent to the term *actio in rem*, which Bracton borrowed from Roman law. Real actions in English law were those in which a man sought to be restored to the enjoyment of some free tenement of which he had been unjustly deprived. The mark of a real action was that therein the required restitution might be enforced by the strong hand of the law dealing directly with the very thing claimed; in other words, process of execution might issue against the thing demanded (*in rem*). The successful litigant in a real action could have the King's writ commanding the sheriff to put him in possession of the identical holding in respect of which the action had been brought. Personal actions were brought to enforce an obligation imposed on a man personally to make satisfaction for a breach of contract or a wrong; in other words, they were brought to obtain pecuniary compensation for a violation of right—what the English law calls damages. Mixed actions were those in which a claim for damages was made along with a claim for the specific recovery of some tenement. Now it was established in Bracton's time that specific restitution could only be obtained in actions for the recovery of immovable things, or tenements. In actions for the recovery of movable things, the defendant might always absolve himself by payment of their value in money, if the things themselves were not forthcoming. Actions for the recovery of movable things were accordingly numbered among per-

sonal actions; for damages only could be recovered with any certainty therein. Real actions then being for the specific recovery of lands or tenements, and personal actions for the recovery of damages, actions were said to be or to *sound* in the *realty* or in the *personalty*, according as the relief afforded therein were the specific recovery of some thing by process of execution issuing against the very thing demanded, or the recovery of damages against the person of a wrongdoer. The word *realty* was also used to denote things recoverable in the realty, or specifically; that is, lands and tenements. Such things were also called things real. Things recoverable in the personalty, or by action and process against the person who wrongfully withheld them, as movable goods, debts, damages, and the like, were termed things personal.

CHAPTER II.

CHATTELS REAL.

BRACON, 27. If, moreover, a gift be made for a term of years, though of exceeding length—longer than the life of man—nevertheless this will not give the donee a freehold, since a term of years is fixed and ascertained, and the limit of life is uncertain, and because, although nothing is more certain than death, nothing is more uncertain than the time of death.

Id., 220. I must now speak of the case of a person being ejected from the use and occupation of any tenement which he holds for a term of years before the expiration of his term. For in one and the same tenement one man may have a freehold and another use and occupation. The usual remedy open to such lessees, when they are ejected before the expiration of their term, is by action of covenant. But inasmuch as this action was not available, except as between lessor and lessee, and third persons could not be bound by the covenant, and even as between lessor and lessee it was an insufficient and inconvenient mode of determining the matter, by the advice of the *Curia Regis* a remedy was provided which the farmer could avail himself of as against any person whatsoever who should turn him out of possession. This was by means of the following writ: "The king to the sheriff, greeting. Command *A.* that he duly and without delay do restore to *B.* so much land with the appurtenances in such a township, from which the said *A.*, who demised the land to *B.* (has wrongfully ejected him, etc.)." Or thus: "If *A.* gives proper security, summon *B.* to show cause why he ejects and keeps ejected *A.* from so much land with the appurtenances which *C.*

demised to *A.* for a term which is not yet passed, and within the said term the said *C.* sold the land to *B.*, by reason of which sale the said *B.* afterward ejected *A.* from the said land, as he saith, etc.” And if such a writ is available against a stranger on account of a sale to him, much more is it available against the lord himself who demised to, and without reason ejected, the lessee, than against a stranger who had some sort of excuse, if at the time of the sale made to him his vendor ejected the farmer, or if on any other ground any one other than the original lessor has ejected the lessee. In that case the writ speaks of “the land which *C.* of *N.* demised for a term which has not yet expired, within which term the aforesaid *A.* or *C.* wrongfully ejected *B.* from the said land, as he alleges, etc.”

DIGBY, HIST. REAL PROP., Ch. III., § 17. *Terms of Years.*
 —The characteristic of this class of interests in land is that the estate is sure to come to an end on the lapse of some specified time, however remote that time may be. The passage is very remarkable, as noting the precise point at which terms¹ of years came to be recognized as estates in land. Before the change here mentioned the termor or lessee had no interest which the law would protect against third persons, nor indeed against the lessor, unless the interest in the lands rested on a *conventio*, or covenant by deed. It had been the practice from very early times to grant leases by deed, and in such a case, if the lessor wrongfully ejected the lessee, the lessee had his remedy by action on the covenant (*per breve de conventionione*), as in the case of any other covenant under seal. The new writ which was introduced, as stated in this passage, afforded the lessee a remedy against his lord, whether the lease was by deed or not; and also gave him a right to protection against ejectment by a third person, and probably an additional remedy, by en-

¹ It should be observed that by the word “term” is meant not only the period during which the interest lasts, but the interest or estate itself.

abling the lessee to recover possession of the land, and not merely damages for breach of covenant. This was called the writ of *quare ejecit infra terminum*.

Thus the interest of the termor or lessee for years, instead of resting at best upon a covenant with his lessor, and therefore being enforceable only as against him, became a right of property which could be enforced against any wrongdoer by a remedy analogous to that provided for a wrongful ouster of a freeholder from his possession. Thus these interests became estates or rights of property in land. There was, however, an important difference in the devolution of the estate on the death of the lessee. Under the earlier law, the persons who, upon the death of the lessee within the term, would have been entitled to the benefit of the covenant, were the executors or administrators of the deceased, and, therefore, it was natural that this new estate or interest should descend not to the heir-at-law, but to the personal representatives, the executors, or administrators of the lessee. Thus, freehold interests came to be classed with personal and not with real property.

LIT., § 740. But where such lease or grant is made to a man and to his heires for terme of yeares, in this case the heire of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattell reall, and chattels realls by the common law shall come to the executors of the grantee, or of the lessee, and not to the heire.

CO., LIT., 388, *a*. Here is a generall rule, that chattels reals as well as chattels personals shall goe to the executors or administrators of the lessee, and not to his heires. For as estates of inheritance or freehold descendible shall go to the heire, so chattels, aswell reall as personall, shall goe to the executors or administrators.

2 BL. COM., 385-388. But things personal, by our law, do not only include things movable, but also something

more: the whole of which is comprehended under the general name of *chattels*, which Sir Edward Coke says¹ is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla*, which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general. In the *grand coutumier* of Normandy a chattel is described as a mere movable, but at the same time it is set in opposition to a fief or feud; so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it: the idea of goods, or movables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest. For since, as the commentator on the *coutumier* observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a real estate; the consequence of which in both laws is that it must be a personal estate or chattel.

Chattels, therefore, are distributed by the law into two kinds; chattels real and chattels personal.

1. *Chattels real*, saith Sir Edward Coke,² are such as concern or savor of the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit*, or the like; . . . And these are called real chattels, as being interests issuing out of, or annexed to, real estates; of which they have one quality, *viz.*, immobility, which denominates them *real*; but want the other—namely, a sufficient, legal, indeterminate duration; and this want it is that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out

¹ 1 Inst. 118.

² 1 Inst. 118.

of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life; their tenants were considered upon feudal principles as merely bailiffs or farmers, and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. . . .

2. *Chattels personal* are, properly and strictly speaking, things movable; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place. And of this kind of chattels it is that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters, which were employed upon real estates; that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

CHAPTER III.

MISCELLANEOUS INTERESTS.

Co. Lit., 18, *b*. And note, that in some places chattels as heire-loomes (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire, and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heire-loome is due by custome and not by the common law. And the ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament. An heire-loome is called *principalium* or *haereditarium*.

SULLIVAN, LAND TITLES (Mass. 1801), 71. There may yet be a question as to what shall, in this country, be considered as real, and what shall be deemed personal estate.

Mortgages, while the equity of redemption remains as not being foreclosed, are chattels, and go to the executor, as they do in England. Pews in churches and places of public worship have been considered variously in the settlement of estates in different counties; but by a late act of the Legislature they are settled as real estate. A subsequent act, however, has provided that pews and privileges in houses of public worship in Boston shall be considered as personal estate.

1 OHIO ST. REP., 350. The Ohio & Pennsylvania Railroad Co. was incorporated February 24, 1848. 46 Ohio Local Laws, 261. The fifth section of its charter provides that the company "shall have all the powers and privileges, and be subject to all the restrictions and provisions of the act regulating railroad companies," passed February 11,

1848. 46 Ohio Laws, 40. The third section of this latter act declares that the shares of stock in the companies that may be subject to its provisions "shall be regarded as personal property, and shall be subject to execution at law." It is therefore manifest, that the petitioner is not entitled to dower in the ten shares of the stock of the Ohio & Pennsylvania Railroad Co., for they are clearly personalty. But the question in respect to the stock in the Mansfield & Sandusky City Railroad Co. is not so easily disposed of. For that company is not, so far as the case shows, subject to the provisions of said act of February 11, 1848. It was previously chartered and organized, and that act does not interfere with companies created before its passage. Turning then to the charter of the company, we find in it no provision declaring whether its stock is realty or personalty. We are thus brought to the general question, whether railroad shares in Ohio are, in the absence of express legislative enactment, to be considered as real or personal estate. This question must be determined by a reference to the principles of the common law, and the general statutes of the State, that have a bearing upon it. And its solution is not without difficulty; for as to the common law the adjudicated cases are directly conflicting, and when we resort to our statutes, the chief aid we derive is from analogies and inference. . . .

By a statute of 10 Anne, the mayor, aldermen, and common council of the city of Bath, their successors or assigns, or such persons as they should appoint, were authorized to improve the navigation of the river Avon, and to charge tolls on persons and property transported thereon. . . .

In *Buckeridge v. Ingram*, decided in 1795, 2 Ves. Jr., 651, the question was directly made, whether these shares were personal or real estate, and it was decided that they were real estate and subject to dower. The master of the rolls held that the right to take the tolls was an incorporeal hereditament arising out of realty and was therefore a "tenement." And he remarked: "I have no difficulty in saying, that

wherever a perpetual inheritance is granted, which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exercisable within it, it is that sort of property the law denominates real."

The principle of these cases was followed, and possibly extended, by the Supreme Court of Connecticut, in 1818, in the case of *Welles v. Cowles*, 2 Conn. 567, in which it was held that shares of an incorporated turnpike company are real estate. The right to the tolls, said the court, "is a right issuing out of real property, annexed to and exercisable within it and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the New River, in canal navigations, and tolls of fairs and markets;" citing *Drybutter v. Bartholomew*, 2 Peere Williams, 127; *Habergham v. Vincent*, 2 Ves. Jr. 232, and *The King v. The Inhabitants of Chipping Norton*, 5 East, 239. . . .

In 1835 the Supreme Court of Pennsylvania held that "a toll-bridge erected by two individuals across a river between their lands, by legislative authority, is real estate." The court said that the right was "not only a right arising out of the soil, but so far as the abutments of the bridge are concerned, it is the soil itself." *Hurst v. Meason*, 4 Watts, 346. It is to be observed, however, that it does not appear that the builders were incorporated.

In *Price v. Price's Heirs*, 6 Dana, 107, the Court of Appeals of Kentucky, in 1838, held that the stock in the Lexington & Ohio Railroad Co. is real estate. Without citing any adjudicated case, the court came to a conclusion which is thus expressed: "The right conferred on each shareholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament."

On the other hand, the Supreme Court of Massachusetts,

in 1798, in *Russell et al. v. Temple et al.*, 3 Dana's Abr. 108, held that shares in incorporated bridge and canal companies are personalty. The case was between the widow and heirs of Thomas Russell, the former contending that the shares were personal property, and that consequently she was entitled to a distributive portion of them, and the latter insisting that they were realty, and that therefore she had but a dower estate. The question was very fully discussed and was decided (says Professor Greenleaf in his edition of Cruise) "upon great consideration." . . .

In his edition of Cruise, Greenleaf says: "Shares in the property of a corporation are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect water-works, and the like, as was the case of the New River water, the navigation of the river Avon and some others, and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll-bridge, canal, and turnpike corporations by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated; in modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate." 1 Greenleaf's Cr. Dig. 39, 40. In support of this statement, Mr. Greenleaf cites the cases we have already noticed, and some

others that require consideration. One of the most important of these is *Bligh v. Brent*, 2 Y. & C. Exch. Rep. 268, 294. It involved the question whether the shares in the Chelsea Water-works Co. were realty or personalty. The act of incorporation left the question open, as it contained no declaration upon the subject. The court reviewed the cases bearing upon it, and came to the conclusion that the shares were personalty. . . .

A careful examination of the adjudications upon the subject has brought us to the conclusion that, according to the weight of authority, the shares in question are personal property. In the early English cases the distinction, now well understood, between the property of a corporation and the rights of its members, does not seem to have been taken, and it appears to have been assumed that each shareholder had an estate in the corporate property, and that, consequently, if that property was real, his share was also realty. But the cases we have cited abundantly show that the distinction above mentioned is now fully recognized in England, and that the property of a corporation may be mainly, if not wholly, real, and yet the shares of its members be personalty. This may, possibly, be an innovation upon the ancient principles of the common law, but it is not more so than has taken place in the case of ordinary partnerships. Thus, the old doctrine seems to have been that there could be no partnership, properly so called, in land, but the contrary doctrine is now universally held; and that a widow of a deceased partner is not dowable in lands which the firm owned and regarded as partnership stock, is settled by numerous decisions, among which are the cases in 1 Ohio Rep. 535, and 8 Ohio Rep. 328. . . . In whatever way we view the case, whether upon adjudication, reason, or our statute laws, we arrive at the conclusion that the shares in question are personal property.—*Per* Thurman, J., in *Johns v. Johns* (1853).

CHAPTER IV.

CORPOREAL AND INCORPOREAL INTERESTS.

BRACTON, 220. There are certain rights which belong to a tenement besides the ownership of the corporeal things; these are from different points of view called rights or servitudes. They are called rights or franchises in reference to the tenements to which they appertain. They are called servitudes in reference to the tenements subject to the obligation; and they always consist in rights over another man's land and not over a man's own land, because no one can have a servitude over his own land, and no one can create a servitude of this kind but he who has lands and tenements, for some lands are free, others subject to a servitude. Land may be called free when it is in no respect bound or subservient to the lands of neighbors. If, however, it is so subservient, land which may before have been free is said to be subjected to a servitude, and this whether its subjection to the land or tenement of another be by the will and grant of the owners, or because of an ascertained obligation, or because of vicinage. . . .

And thus a servitude is created over another man's land, sometimes by act of party, sometimes by acquiescence and user. And in the same way it is sometimes imposed by law, and neither by act of party nor by user, for instance, that no one should do on his own land anything by which damage or harm should result to his neighbor. For harm may be permitted by law, or it may be wrongful. It is wrongful when any one does any act on his own land wrongfully, contrary to law or contrary to a grant, he being forbidden by law to do the act. But if he be not forbidden by law to do

the act, although he does harm and causes damage, yet the act will not be wrongful, for it is lawful for any one to do upon his own land anything which will not cause wrongful damage to his neighbor; as if any one erects a mill on his own land, and diverts from his neighbor his own custom and that of the neighbors, he thereby does his neighbor harm but not injury, since he is not forbidden either by law or covenant to have or erect a mill. Again, there are servitudes which are imposed by law on neighboring tenements, as, for instance, that a man should not raise the level of the water in his pool so high as to drown the land of his neighbor. Another instance is that a man may not make a ditch on his own ground so as to divert his neighbor's water, or so as to prevent it in whole or in part from flowing back into its ancient channel.

HALE, ANALYSIS, 46-50. Things real are of two kinds: Corporeal, incorporeal.

Corporeal things real are such as are manurable. And they again are of two kinds—simple, aggregate.

Things corporeal which are simple are generally comprehended under the name of lands, which yet are distributed into several kinds, according to their several qualifications, and accordingly are demandable in writs. . . .

Things incorporeal are of a large extent, but may be reducible into these two general kinds—namely, things incorporeal, not in their own nature, but so called in respect of the degree or circumstance wherein they stand; as reversions, remainders, the estate of lands. . . .

Things incorporeal in their own nature—and these are of very great variety, and hardly reducible into general distributions; and therefore I am forced to take them by tale—namely, rents reserved or granted, as rent service, rent charge, rent seck. . . . Services personal incident to tenures; as homage, fealty and knights service. Advowsons of all sorts. . . . Tithes of all sorts. . . . Commons of all sorts; as common of estovers and of pasture, ap-

pendant and appurtenant, for cattle certain and for cattle *sans* number, *separabilis pastura*. . . . All kinds of *proficua capienda in alieno solo*; as herbage, pawnage, etc. . . . All kinds of pensions, proxies (procurations), etc. . . . Offices of all sorts. . . . Franchises and liberties of all sorts. . . . Villeins: Dignities; as dukes, marquises, earls, viscounts, barons, etc.; and thus far touching incorporeal real things temporal.

Their common incident is that they pass not from one to another without deed. And to these several titles may be reduced all the learning of each particular.

2 BL. COM., 16-19. *Of Corporeal Hereditaments*.— . . . First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature, being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke,¹ is by much the largest and most comprehensive expression, for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. Thus, an heirloom or implement of furniture which by custom descends to the heir together with a house, is

¹ 1 Inst. 6.

neither land nor tenement, but a mere movable; yet being inheritable, is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke,¹ comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, said he, of two things: *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only, either by calculating its capacity, as, for so many cubical yards; or by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed and immovable; and therefore in

¹ 1 Inst. 4.

this I may have a certain substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface, as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it or over it. And, therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing; but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass.¹

Id., 20-43. *Of Incorporeal Hereditaments*.—An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in

¹Co. Litt. 4, 5, 6.

idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them. An annuity, for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal, yet they are indeed incorporeal hereditaments; for they, being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense; that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

I. Advowson is the right of presentation to a church or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*; and he who has the right of advowson is called the patron of the church. . . .

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch, and yet it perpetually exists in the mind's eye and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it. If the patron takes corporeal possession of the church, the churchyard, the glebe, or the like,

he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of invisible mental transfer; and being so vested, it lies dormant and unnoticed till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the church. . . .

II. A second species of incorporeal hereditaments is that of tithes, which are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants; the first species being usually called *predial*, as of corn, grass, hops, and wood; the second *mixed*, as of wool, milk, pigs, etc., consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due. . . .

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament, being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

1. Common of *pasture* is a right of feeding one's beasts on another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

Common *appendant* is a right belonging to the owners or occupiers of arable land to put commonable beasts upon the lord's waste and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the

plough or such as manure the ground. This is a matter of most universal right, and it was originally permitted not only for the encouragement of agriculture, but for the necessity of the thing. . . . Common *appurtenant* ariseth from no connection of tenure nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity, like common appendant, is therefore not of general right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighborhood, is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another, the beasts of the one straying mutually into the other's fields without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of themselves, the law winks at the trespass. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. . . .

2, 3. Common of *piscary* is a liberty of fishing in another man's water, as common of *turbary* is a liberty of digging turf upon another's ground. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects;

though in one point they go much further, common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

4. Common of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word *bote* is used by us as synonymous to the French *estovers*; and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house, which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hay, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.

These several species of commons do all originally result from the same necessity as common of pasture, *vis.*, for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family, common of turbary and fire-bote for his fuel, and house-bote, plough-bote, cart-bote, and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of *ways*, or the right of going over another man's ground. I speak not here of the king's highways which lead from town to town, nor yet of common ways leading from a village into the fields, but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be granted on a special permission, as when the owner of the land *grants* to another the liberty of passing over his grounds to go to church, to

market, or the like, in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person, and if the grantee leaves the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. A way may be also by *prescription*; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it, and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased, which was the established rule in public, as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.

V. Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments, whether public, as those of magistrates, or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. Neither can any judicial office be granted in reversion, because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient; but ministerial offices may be so

granted, for those may be executed by deputy. Also by statute, 5 and 6 Edw. VI., c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For the law presumes that he who buys an office will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book;¹ it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms, and their definition is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the Crown, they must arise from the king's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various and almost infinite. I will here briefly touch upon some of the principal, premising only that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise that has before been granted to one cannot be bestowed on another, for that would prejudice the former grant.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are to hold a court-leet; to have a manor or lordship, or, at least, to have a lordship paramount; to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands; to have a court of one's own, or liberty of holding pleas and trying causes; to have the cognizance of pleas,

¹ See Book I., ch. 12.

which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction; to have a bailiwick, or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process; to have a fair or market, with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, which tolls must have a reasonable cause of commencement (as in consideration of repairs or the like), else the franchise is illegal and void; or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty. . . .

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments, though not chargeable on or issuing from any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added:

IX. Annuities, which are much of the same nature, only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded, a rent-charge being a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore, if a man by deed grant to another the sum of £20 *per annum* without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity, which is of so little account in the law that if granted to an eleemosynary corporation, it is not within the statutes of mortmain, and yet a man may have a real estate in it, though his security is merely personal.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given

for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money, for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent. It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like, which services, in the eye of the law, are profits. This profit must also be *certain*, or that which may be reduced to a certainty by either party. It must also issue *yearly*, though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year; yet, as it is to be produced out of the profits of lands and tenements as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out of* the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt, though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents; rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporeal service incident to it, as at the least fealty or the feudal oath of fidelity. For, if a tenant holds his land by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent, these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these. in

case they be behind or arrear at the day appointed, the lord may distrain of common right without reserving any special power of distress, provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land, as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. *Rent-seck*, *reditus siccus*, or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called *chief-rents*, *reditus capitales*; and both sorts are indifferently denominated *quit-rents*, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white-rents*, *blanch-farms*, *reditus albi*, in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri*, or *black-mail*. *Rack-rent* is only a rent of the full value of the tenement or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands, at the time of its reservation; for a grant of lands reserving so considerable a rent is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years.

These are the general divisions of rents; but the difference between them (in respect to the remedy for recovering

them) is now totally abolished, and all persons may have the like remedy by distress for rent-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease.¹

DIGBY, HIST. REAL PROP., App., § 1. At the head of his classification of rights over land Blackstone places the distinction between *corporeal* and *incorporeal hereditaments*. Unsatisfactory as this nomenclature is, it points to a fundamental distinction between two classes of rights *in rem* which it is convenient to take at the outset of a systematic discussion of the law of land. The distinction is between rights over land which entitle their possessor to speak of the thing as his own, and rights over land which is in ordinary language the property of another. It will be sufficient to style the former *rights of ownership*, the latter *rights in alieno solo*.

The word "ownership" is here used as applicable to that class of rights which entitle the person having them to speak of the subject of the rights as his own. The great characteristic of these rights, according to Mr. Austin, is that the person having them may put the thing which is the subject of the right to uses which, though not unlimited (for no rights of user are wholly unlimited), are yet indefinite.² Generally speaking, and within limitations more or less wide, tenant in fee, tenant for life, tenant for years can use the thing which is the subject of the right as he pleases—can do what he will with his own.

Opposite to these rights of indefinite user is the class of rights the very essence of which consists in the fact that the person having the right can only put the land which is the subject of it to uses of a strictly defined and limited character. A person who has a right of way over his neighbor's land can only use the land for the purpose of crossing it on foot or with horses or cattle, according to the nature of the right, which depends on the terms of the original grant by which it has been created, or on the extent to which the user has, as a matter of fact, been enjoyed for the time re-

¹ Stat. 4 Geo. II., c. 28.

² See Austin, lect. xlvii., xlviii.

quired by law to create the right. The rights which the creditor has under certain circumstances over his debtor's land may also be referred to the class of rights *in alieno solo*.

These rights *in alieno solo* comprise a large portion of the rights called by Blackstone *incorporeal hereditaments*. In fact the classes of rights *in alieno solo* styled easements and profits, seem to constitute the class of rights which Blackstone designates by that name. . . .

The principal rights recognized by the law as easements properly so called are rights of *way*, *i.e.*, of going over the land of another on foot, on horseback, or with carriages or cattle, in a certain line, or for certain purposes; *water-courses*, for example, where a person has the right to divert a flow of water to which, except for this special right, the owner of the *praedium serviens* would be entitled; the right to discharge water or other matter upon a neighbor's house or land; the right to restrain a use of land which obstructs the access of light and air to an "ancient" window.

Of profits, the principal are *rights of common* of various kinds; . . . *rents* (the right to a rent issuing out of the land, unconnected with the relation of landlord and tenant) may be classed under the same head; as also might *tithes* have been before the act for their commutation (6 and 7 Will. IV., c. 71).

It appears to be more accurate to class creditor's rights under the head of rights *in alieno solo*; though in the earlier stages of our law, as has been seen above,¹ the tendency in the case of mortgages was to make the right of the creditor after default absolute. As legal ideas progress and become more refined, the notion that the land is only a security for the debt comes into prominence, and regulates the real rights of the parties, and the creditor is reduced to his true position of having simply a right *in alieno solo*.

¹ Chap. V., § 5 (2).

BOOK II.

OWNERSHIP OF REAL PROPERTY.

A. LEGAL OWNERSHIP.

I. The Feudal System.

CHAPTER I.

ABSOLUTE OWNERSHIP AND TENURE.

Co. Lit., 65, *a*. For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in *England* in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before.¹ Secondly, all the lands within this realme were originally derived from the crowne, and therefore the king is sovereigne lord, or lord paramount, either mediate or immediate, of all and every parcell of land within the realme.

Id., 191, *a*. Upon the whole, the most probable conjecture appears to be that evident traces of something similar to the feud may be traced in the Saxon polity; that it was established, with its concomitant appendage of fruits and services, by the Norman barons in the possessions which were parcelled out among them by the conqueror; and that, about the middle of his reign, it was formally and universally established

¹ Co. Lit. 1, *a*.—ED.

by law. This universality of tenure is, perhaps, peculiar to England. In other kingdoms those parts of the lands which were permitted to remain in the hands of the natives, and a considerable part of those which the conquerors parcelled out among themselves, were not originally subject to tenure. In the earliest age, however, of the feudal law, some advantages attended tenure, and frequently occasioned the conversion of allodial into feudal property. But in the anarchy which followed the removal of the Carlovingian dynasty, there was an end of all political government; so that almost all persons found it advantageous to enter into the feud. To effect this they delivered up their lands, sometimes to the sovereign, sometimes to some powerful lord, and sometimes to the church, on condition to receive it back in feudality. Lands, thus delivered and returned, received the appellation of *feuda data et oblata*. Some portion of lands, however, still remained free. Of this the proportion differs in the countries on the continent. In some, the courts presume it to be feudal, till it is proved to be allodial. In others the presumption is in favor of its allodality. . . . But with us, in the eye of the law, tenure is universal—that is, the *dominium directum* of all the lands in the kingdom is in the Crown; the *dominium utile* of them is in the tenant.—*Butler's note*, 77, ¶. 1.

2 BL. COM., 104-105. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *alodium*, which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seized thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior on condition of rendering him service, in which superior the ultimate prop-

erty of the land resides. And therefore Sir Henry Spelman¹ defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services, the mere allodial property of the soil always remaining in the lord. This allodial property no subject in England has, it being a received and now undeniable principle in the law that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium*; but all subjects' lands are in the nature of *feodum* or fee, whether derived to them by descent from their ancestors or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it,² he hath *dominium utile*, but not *dominium directum*. And hence it is that in the most solemn acts of law we express the strongest and highest estate that any subject can have by these words: "He is seized thereof in his demesne, as of fee." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever; yet this *dominium*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, as of fee—that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

WILLIAMS, PERS. PROP., 7-8. The first lesson to be learned on the nature of real property is this: that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate. There may be an estate for life, or an estate tail, or an estate in fee-simple; but, according to the law of England, there cannot exist over landed property any absolute and

¹ Of Feuds, c. 1.

² Co. Litt. 1.

independent dominion. All the land in the kingdom is the subject of tenure; and if the estate is not holden of any subject, at any rate it must be held of the Crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot be held for any estate. It is true that the phrase personal estate is frequently used as synonymous with personal property; but this general use of the term estate should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called. The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, movable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such as leases for years, of whatever length, and Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to movable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal.

2 POLL. & MAIT., HIST. ENG. LAW, 2-6. One of the main outlines of our mediæval law is that which divides material things into two classes. Legal theory speaks of the distinction as being that between "movables" and "immovables"; the ordinary language of the courts seldom uses such abstract terms, but is content with contrasting "lands and tenements" with "goods and chattels." We have every reason to believe that in very remote times our law saw differences between these two classes of things;

but the gulf between them has been widened and deepened both by feudalism and by the evolution of the ecclesiastical jurisdiction. We shall be better able to explore this gulf when, having spoken of lands, we turn to speak of chattels; but even at the outset we shall do well to observe, that if in the thirteenth century the chasm is already as wide as it will ever be, its depth has yet to be increased by the operation of legal theory. The facts to which the lawyers of a later day will point when they use the word "hereditaments" and when they contrast "real" with "personal property" are already in existence, though some of them are new; but these terms are not yet in use. Still more important is it to observe that Glanvill and Bracton—at the suggestion, it may be, of foreign jurisprudence—can pass from movables to immovables and then back to movables with an ease which their successors may envy. Bracton discourses at length about the ownership of things (*rerum*), and though now and again he has to distinguish between *res mobiles* and *res immobiles*, and though when he speaks of a *res* without any qualifying adjective, he is thinking chiefly of land, still he finds a great deal to say about things and the ownership of things which is to hold good whatever be the nature of the things in question. The tenant in fee who holds land in demesne, is, like the owner of a chattel, *dominus rei*; he is *proprietaryus*; he has *dominium et proprietatem rei*. That the law of England knows no ownership of land, or will concede such ownership only to the king, is a dogma that has never entered the head of Glanvill or of Bracton. . . .

But we ought to hesitate long before we condemn Bracton and those founders of the common law whose spokesman he was, for calling the tenant in demesne an owner and proprietor of an immovable thing. Only three courses were open to them: (1) To deny that any land in England is owned; (2) to ascribe the ownership of the whole country to the king; (3) to hold that an owner is none the less an owner because he and his land owe services to the king or to

some other lord. We can hardly doubt that they were right in choosing the third path; the second plunges into obvious falsehood; the first leads to a barren paradox. . . . As a matter of fact, the services that the tenant in fee owed for his land were seldom very onerous; often they were nominal; often, as in the case of military service, scutage and suit of court, they fell within what we should regard as the limits of public law. Again, it could hardly be said that the tenant's rights were conditioned by the performance of these services, for the lord, unless he kept up an efficient court of his own, could not recover possession of the land though the services were in arrear. The tenant, again, might use or abuse or waste the land as pleased him best. If the lord entered on the land, unless it were to distrain—and distress was a risky process—he was trespassing on another man's soil; if he ejected the tenant "without a judgment," he was guilty of a disseisin. As against all third persons it was the tenant in desmesne who represented the land; if a stranger trespassed on it or filched part of it away, he wronged the tenant, not the lord. And then the king's court had been securing to the tenant a wide liberty of alienation—for an owner must be able to alienate what he owns. The feudal casualties might indeed press heavily upon the tenant, but they need not be regarded as restrictions on ownership. An infant land-owner must be in ward to some one, and to some one who as a matter of course will be entitled to make a profit of the wardship; but if a boy's ownership of his land would not be impaired by his being in ward to an uncle, why should it be impaired by his being in ward to his lord? If the tenant commits felony, his lands will escheat to his lord; but his chattels also will be forfeited, and it may well be that this same lord (since he enjoys the franchise known as *catalla fclonum*) will take them. It is very possible that Bracton saw the Roman land-owner of the classical age holding his land "of" the emperor by homage and service; it was common knowledge that the modern Roman emperor was surrounded by feudatories; but at any rate there was no

unfathomable chasm between the English tenancy in fee and that *dominium* of which the Institutes speak.

DIGBY, HIST. REAL PROP., Ch. I., sec. 1, § 2. *Bookland and Folkland*.—From very early times it was common to make grants of land to religious bodies or to individuals. The grants were effected by the king as the chief of the community, with the consent of the great men, who in conjunction with the great ecclesiastics, after the introduction of Christianity, formed the Witenagemot, or Assembly of the Wise. The grant was made by means of a "book" or charter. Land thus granted was said to be "booked" to the grantee, and was called bocland or bookland. Thus bookland comes to mean land held under a written instrument by private persons or churches, who or whose predecessors are, or at least are supposed to have been, grantees of the community. The practice seems, after the introduction of Christianity, to have prevailed chiefly in favor of religious houses, and in this way the great ecclesiastical corporations acquired their property. Frequent gifts were also made to individuals, chiefly the king's thegns or *ministri*.

In process of time the conception of bookland seems to be coextensive with that of alodial land. The term "alodial" originally had no necessary reference to the mode in which the ownership of land had been conferred; it simply meant land held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of the land was bound to render service. It would thus properly apply to the land which in the original settlement had been allotted to individuals, while bookland was primarily applicable to land the title to which rested on a formal grant. Before long, however, the words appear to have been used synonymously to express land held in absolute ownership, the subject of free disposition *inter vivos* or by will. . . .

As a general rule, when such a grant was made to an

individual, it is expressed in the charter itself that he is to hold the land free from all burdens, that he is to be under no obligation to render anything in the shape of money payment or services of any kind to the grantor of the land, with the exception of the threefold service, the *trinoda necessitas*, to which all lands were subject. This consisted of the duty of rendering military service (*expeditio*), and of repairing bridges and fortresses (*pontis arcisve constructio*). These were duties imposed on all landholders, distinct from the feudal services of later times, but tending more and more to become duties attaching to the possession of the land owed to and capable of being enforced by the king or the great man of the district.

. ID., Ch. I., sec. II. The principal agents by which alodial owners of land were turned into feudal tenants were probably *conquest* and *need of protection*. The lot of the conquered is always hard, and doubtless the alodial holder of land was glad to retain the enjoyment of a portion of his property on such terms as the conqueror chose to impose. The usual conditions were that the old free proprietor should become the "man" of the conqueror, and should be bound to military service. Moreover, in those troubled times it often became a necessity for the poor alodial holder to enter into the train of retainers of a powerful lord in order to obtain protection; hence the practice of "commendation," of becoming the man or vassal of the lord, receiving in return the protection without which the preservation of life and property was impossible. An element in this process was the surrendering of the alodial lands, to be received back under the condition of rendering military or other service. Such is in outline the probable account of the origin of the great characteristic of feudalism—military tenure of lands; known in our law by the name of tenure in knight-service, or in chivalry.

CHAPTER II.

FEUDAL TENURE.

(a) *In General.*

Co. Lit., 1, a. "Tenant," in Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five significations. . . . 2. It signifieth the tenure or the service whereby the lands and tenements be holden; . . . and he is called a tenant [or holder] because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a tenant, because he hath no superior but God Almighty.

Id., 191, a. Sir Henry Spelman, after Cujas, defines a fief to be, "A right which the vassal hath in land, or some immoveable thing of his lord's, to use the same, and take the profits thereof, hereditarily, rendering unto his lord such feudal duties and services as belong to military tenure; the mere propriety of the soil always remaining to the lord." This definition appears accurate and comprehensive: and an analysis of it may point out those peculiar and characteristic marks which distinguish the feudal law from every other law. Ist. Where the soil, and the right to the profits of the soil, meet in the same person, he may be said to have an absolute and unmixed estate in his land. This absolute and unmixed estate, the subject of every kingdom not governed by the feudal polity, so far as respects the relation between sovereign and subject, appears to possess. But, by the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil, and the right to

the profits of the soil, were separate; the tenant being invested with the latter, the sovereign continuing to be intitled to the former. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land during the term of his tenure. . . . This right in the vassal to the use and profits of the land, while the direct dominion of the land remained in the lord, was, with respect to the relation between the sovereign and the subject, a new and original point of connexion, and one of those marks which distinguish the feudal from every other law.

2. Another of these marks is, that immoveable or real property only was admitted to be held in feudality, or, in other words, to be the substance of a fief. Wherever the conquerors we speak of established themselves they seized whatever they desired of the property of the conquered, and the general allotted it to the superior officers of the army, and these again divided it, in smaller parcels, among the inferior officers. The moveable, as well as the immoveable property of the conquered was seized and divided by the conquerors; but moveable property, from its fluctuating and perishable nature, was ill calculated to serve, either as the sign or the subject of a permanent connection. This was particularly the case in those days when it had in no point of view acquired, or was considered susceptible of, those artificial modifications or other durable qualities, in the intendment of law, which it now possesses. Land, therefore, or immoveable property, alone, became the subject of feudal tenure. . . .

But at the first establishment of fiefs, land or immoveable property, in the narrowest sense of that word, was the subject of a fief. That this species of property, to the utter exclusion of every species of moveables, should be a point of connexion between the sovereign and the subject, is another distinctive mark of feudality. To this it is owing, that while in this country, and in every other country whose jurisprudence is of a feudal extraction, the difference be-

tween real and personal, or immoveable and moveable property, is so strongly marked, and the legal qualities and incidents of the two species of property are, in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.

3. The remaining point of difference between the feudal polity and the polity of other states is, the nature of the relation between the chief and the vassals. This is particularly distinguishable by six circumstances: 1stly, The relation between them was purely of a military nature; 2dly, Behind the sovereign and his immediate feudatories there followed a numerous train of arrere vassals, or sub-feudatories, between whom and the first or immediate feudatory there subsisted a relation nearly similar to that between him and the first or chief lord; 3rdly, This relation was territorial, and was not considered to arise from the general allegiance due from a subject to a sovereign, but from an implied obligation supposed to be annexed to the tenure of the fee; 4thly, The right of administering justice was an appendage of this military relation, and originally commensurate to it in its territorial extent; 5thly, The lord was not allowed to alien the fee without his tenant's consent, nor the tenant without the consent of his lord; and 6thly, Though in point of dignity, of rank, and of honor, the lord, according to the ideas of those times, enjoyed a splendid pre-eminence over his vassals, his power over them was, comparatively speaking, extremely small. Thus, therefore, the supposed preservation of the *dominium directum*, or real ownership, to the lord, after he had parted with the beneficial ownership, or *dominium utile*, to the tenant; the exclusion of moveable property from serving either as the sign or the subject of the relation between the sovereign and the feudatory; and the military nature of this relation, including in it the other circumstances before noticed, should be considered as three principal points which distinguish the law of feuds from every other law.—*Butler's note*, 77, II.

2 BL. COM., 59. Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to *A.*, and he granted a portion of the land to *B.*, now *B.* was said to hold of *A.* and *A.* of the king; or, in other words, *B.* held his lands immediately of *A.*, but mediately of the king. The king therefore was styled lord paramount; *A.* was both tenant and lord, or was a *mèsne* lord, and *B.* was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail or profit of the land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects; for, according to Sir Edward Coke,¹ in the law of England we have not properly *allodium*; which, we have seen, is the name by which the feudists abroad distinguished such estates of the subject as are not holden of any superior. So that at the first glance we may observe that our lands are either plainly feuds or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to

¹ 1 Inst. 1.

greater and more burthensome services than inferior tenures did.

DIGBY, HIST. REAL PROP., Ch. I., sec. II., § 2. *Development of the Idea of Tenure.*—A principal result of the Norman Conquest upon the customary law of land seems to have been the development of the idea of tenure, the more precise definition of the mutual rights and duties of lord and tenant, and, as a necessary consequence, the introduction of a technical phraseology. This result was not brought about by any positive enactment. It was due to the introduction of Norman customs and ideas, and their combination with Anglo-Saxon customs and ideas.

Thus was produced what is called the feudal system, or the feudal mode of holding lands. We find that wherever there is a duty imposed on the possessor of land, whether of a military or other character, the tendency after the Conquest was to regard the duty as the *service* by which the land was *held* of the king or lord. Thus the Anglo-Saxon custom that every five hides should furnish a fully-armed man would be transformed into a tenure of so much land by the duty or service of providing a *miles*. The duty of attendance on the lord's court became the tenure by suit and service, and the duty of performing agricultural service on the lord's domain became the service by which the land of the poor freeholder or villein was held.

Domesday bears abundant traces of the growth of the idea of tenure, though we still hear of the men (*homines*) of a lord rather than of his tenants. The land is everywhere spoken of as having been *held* of King Edward or some other lord. The word *feudum* or *feuum* is used to designate the land which is held as a benefice and not alodially. The personal relation of lord and man is closely connected with, and generally, though not always, merged in the relation of lord and tenant. The various modes in which land was held by different classes of persons before the Conquest were now tending to become different species of tenure, and grad-

ually acquiring definite technical names. Thus land held by religious houses, which before the Conquest was always free from all temporal service except the *trinoda necessitas*, is now said to be held by the tenure called *libera eleemosyna* (free alms or frankalmoign). It is, however, still regarded as free from all temporal dues, and the religious corporation is only bound to spiritual service. The services due to the king, which if rendered to one of less exalted rank would have been considered degrading to a freeman, were still in the time of Domesday rendered by the *taini regis*, but were no doubt becoming connected with the holding of the land, and passing into the exalted tenure of *magnum servitium*, or grand serjeanty. Hence it was that lands held by this tenure can only be held of the king. But most important of all is tenure *per militiam*, in chivalry or by knight-service. Here again the evidence afforded by Domesday seems to show that this species of tenure had not yet definitely taken its place in the legal classification of rights of property, but was gradually becoming recognized. No doubt military tenure first prevailed between the king and his immediate tenants—those who had actually received new grants of land, or their old lands regranted to them. By the Anglo-Saxon law the public duty was imposed on such tenants of rendering military service for the defense of the country. Continental feudal notions would transform this public duty into the obligation of rendering military service to the king as lord of the tenants' land. But his position as king as well as lord was never wholly lost sight of. If a mesne lord, that is, a lord who was himself a tenant of the king or of some superior lord, made a grant of land to be held of himself by military services, though the land was of course held of the mesne lord, the military service was regarded as due not to the immediate lord, but to the king.

I POLL. & MAIT., HIST. ENG. LAW, 210-217, § 1. *Tenure in General*.—Every acre of English soil and every proprietary right therein have been brought within the compass of a single

formula, which may be expressed thus: *Z. tenet terram illam de . . . domino Rege*. The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is "held of" the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately. In the simplest case he holds it immediately of the king; only the king and he have rights in it. But it well may happen that between him and the king there stand other persons; *Z.* holds immediately of *Y.*, who holds of *X.*, who holds of *V.*, who holds . . . of *A.*, who holds of the king. Let us take one real instance:—In Edward I.'s day Roger of St. German holds land at Paxton in Huntingdonshire of Robert of Bedford, who holds of Richard of Ilchester, who holds of Alan of Chartres, who holds of William le Boteler, who holds of Gilbert Neville, who holds of Devorguil Balliol, who holds of the king of Scotland, who holds of the king of England.¹ A feudal ladder with so many rungs as this has, is uncommon; but theoretically there is no limit to the possible number of rungs, and practically, as will be seen hereafter, men have enjoyed a large power, not merely of adding new rungs to the bottom of the ladder, but of inserting new rungs in the middle of it. The person who stands at the lower end of the scale, the person who seems most like an owner of the land, and who has a general right of doing what he pleases with it, is said to hold the land in demesne; *Z. tenet terram in dominico*, or *in dominico suo*. We suppose that he holds it of *Y.*; in that case *Y.* is the lord (*dominus*) of *Z.*, and *Z.* is the tenant (*tenens*) of *Y.*. But *Y.* again is said to hold the land; he holds it, however, not in demesne but in service (*tenet terram illam, non tamen in dominico sed in servitio*); and *Y.* again must hold it of some one—let us say of *X.*—whose tenant he will be, who will be his lord, and who also will be said to hold the

¹ Rot. Hund. ii, 673.

land in service. Ultimately we shall reach the king; *A.* or some other person, will hold the land immediately of the king and be his tenant-in-chief (*in capite*). Every person who stands between the king and him who holds in demesne, every *mesne lord* or *mesne*, is both lord and tenant, lord as regards those who stand below him, tenant as regards those who stand above.

Before attempting to analyze this notion of dependent and derivative tenure, let us first observe how universally it has been applied. Not only has every acre of land been brought within its scope, so that the English lawyer cannot admit even a bare possibility of land being holden of no one, but the selfsame formula has been made to cover relationships which have little in common. An Earl of Chester, who may at times behave like a sovereign prince, holds his county palatine of the king; the cottier, who like enough is personally unfree, holds his little croft of some mesne lord, or of the king himself. Even when of late a new mode of cultivating the soil has made its appearance and lords have let land to farmers for terms of years at substantial money rents, this new relationship has been brought within the old formula: the lessee holds the land of the lessor. Even when the tenant has no rent to pay, no temporal service to perform, even when the land has been devoted to God and the saints and is possessed by a religious house in free alms, still the formula has been found equal to the occasion: the religious community holds the land of the donor. We see at once, therefore, that the formula must be very elastic, that the notion of tenure must be in the highest degree an abstract notion. In England tenure is no mark of a class, and we may say the same of "feudal" tenure. . . .

It is clear then that of dependent or of feudal tenure in general little can be said; but still some analysis of it is possible. We may at least notice that it seems to be a complex of personal rights and of real rights. On the one hand, the lord has rights against his tenant, the tenant rights against his lord; the tenant owes services to his lord; the lord, at

least normally, owes defence and warranty to his tenant. On the other hand, both lord and tenant have rights in the land, in the tenement, the subject of the tenure. The tenant in demesne, the tenant on the lowest step of the feudal scale, obviously has rights in the land amounting to a general, indefinite right of using it as he pleases. But his lord also is conceived as having rights in the land. We have not adequately described his position by saying that he has a right to services from his tenant. Of him as well as of his tenant it may be said that he "holds" the land, not indeed in demesne but in service, that the land is his land and his fee, and even that he is seised, that is, possessed of the land. What has been said of the demesne tenant's immediate lord may be said also of that lord's lord; he also has rights in the land and the land is in some sort his. This, when regarded from the standpoint of modern jurisprudence, is perhaps the most remarkable characteristic of feudalism: several different persons in somewhat different senses may be said to have and to hold the same piece of land. We have further to conceive of the service due from the tenant to his lord as being a burden on the tenement. It is service owed by the tenement. This idea is so deeply engrained in the law that the tenement is often spoken of as though it were a person who could be bound by obligations and perform duties: hides and virgates must send men to the war, must reap and mow and do suit of court; "these two half-hides ought to carry the king's writs whenever they come into the country."¹ But the vast liberty that men have enjoyed of creating new tenures and sub-tenures gives us wonderful complications: the obligation of the tenement has to be kept distinct from the obligation of the tenant. The tenement may be burdened with military service, and yet, as between lord and tenant, the lord and not the tenant may be bound to do it: all the same the land itself is burdened with the duty and the lord's overlord may have his remedy against the land.

To take a simple case: The king has enfeoffed *A.* to hold

¹ Testa de Neville, 71.

by military service; *A.* can now proceed to enfeoff *B.*, . . . and may enfeoff *B.* by some quite other service; *B.* for example is to pay *A.* a money rent. . . . And then if *B.* enfeoffs *C.*, the problem will reappear in a more complicated shape; some new service will perhaps be created, for instance, *C.*, who is a parson, is to pray for the soul of *B.*'s ancestors; but there are two other services incumbent on the land, the rent that *B.* owes to *A.*, the military service that *A.* owes to the king, and in one way or another those services must be provided for. As between themselves, *B.* and *C.* can settle this matter by the terms of their bargain, but without prejudice to the rights of *A.*, and of the king. It is no impossibility that Edward should hold in villeinage of Ralph, who holds in free socage of the Prior of Barnwell, who holds in frankalmoin of Earl Alan, who holds by knights service of the king. Just as at the present day one and the same acre of land may be leasehold, copyhold, and freehold—for there is no land without a freeholder—so in the past one and the same acre might be holden by many different tenures. It owed many and manifold services, the incidence of which, as between its various lords and tenants, had been settled by complicated bargaining.

(b) *Descent.*

1 POLL. & MAIT., HIST. ENG. LAW, 213. The term *feodum*, which in Anglo-French is represented by *fe*, *fie*, *fee* and in English by *fee*, is one of the words which came in with the conqueror, and perhaps for a short while it carried about with it a sense of military or noble tenure; but very soon it was so widely used as to imply no more than heritability. This is its settled sense in the thirteenth century. To say of a tenant that he holds in fee (*tenet in feodo*) means no more than that his rights are inheritable. He does not hold for life, he does not hold for a term of years, he does not hold as guardian of an heir, or as one to

whom the land has been gaged as security for money; he holds heritably and for his own behoof. . . .

Id., 288-293. We must not here discuss the canons of inheritance; it will be sufficient if we notice a few salient points. In the first place, the "heir" of English law is an essentially different person from the Roman "heres"—he never claims under a will. With few exceptions, the broad rule holds good that no one can give rights in land by his will, and even in those cases in which such rights are thus given the person who gets them does not get them as "heir." Only God, says Glanvill, can make an heir, not man.¹ A distinction between land and movables is thus established; even when the dead man has not bequeathed his movables, the heir as such has no claim to them. In the second place, one main rule of the law of inheritance is the primogenitary rule—among males of equal degree only the eldest inherits. This rule has been gradually extending itself; once appropriate to the military tenures, it is becoming the common law for all. Women can inherit even though the tenure be military; they are postponed to males of equal degree; several women of equal degree will share the inheritance between them, will be coheirresses (*coheredes*). Lastly, though the rights of a tenant of land are usually heritable, this is not always the case; *A.* may give land to *B.* merely for his (*B.*'s life; on the death of this tenant for life there will be nothing for his heir; the land will "return" or "revert" to *A.* But more, to make the rights of the donee heritable rights, the giver must use words which make this plain; if he merely gives the land "to *B.*," then *B.* is only a tenant for life; he must give it "to *B.* and his heirs." But the heir, whom we will suppose to be of full age, does not come to his inheritance without having to pay for it; he has to pay to his lord—and this is what concerns us here—a relief (*relevium*, or in earlier documents *relevatio* or *relevamen*). . . .

The amount of the due relief is not the only, perhaps not the most important, point that has been in debate. A tenant

¹ Glanvill, vii., 1.

dies; his heir was living in the same house with him; or his heir was not living on the tenement, but at once presents himself; or his heir has gone to the wars, or has gone on pilgrimage; or two claimants appear, each asserting that he is heir; or a stranger intrudes himself into the tenement, setting up a claim as heir, or relying on some title adverse to the ancestor, or on his strong right arm; what in all these cases are the rights of the lord? To simplify the question, What is the general notion of the lord's right—is he entitled to take the land and hold it until the true heir asks for it, does homage and pays relief, or is he only entitled to receive the relief having no concern with the land? There has been a conflict between inconsistent theories representing inconsistent interests. Already in Glanvill's day it is settled that if the heir is in seisin the lord may not turn him out; the heir may resist the lord. Still the lord is entitled to a certain recognition of the fact that, though the tenement belongs to the tenant, it belongs also to the lord; he may enter and go through the ceremony of taking seisin, but he must do no damage. Bracton repeats this: in the case just put the lord may have "a simple seisin" of the land which does not disturb the heir's seisin. But other cases must be discussed; for example, at the ancestor's death the heir may be absent, the tenement left vacant. In this case the lord may enter, and then the heir when he appears must not oust the lord by force; if he does so, the lord will have an action against him and will be restored to possession. So again, if there are two rival claimants of the inheritance neither of whom is yet in possession, the lord may enter and hold the land until one of the two has proved his right. We must remember that if no heir appears, the tenement will belong to the lord for good and all; also that if there is a dispute between several would-be heirs, the lord's court is, at least in theory, the proper tribunal for its decision, and the lord who takes homage from a pretender runs great risk in so doing; he may have to warrant that pretender's seisin, unless he has been careful to declare that the homage is re-

ceived without prejudice to the rights of other claimants. A conflict between two sets of proprietary rights, those of the lord and those of the tenant, is thus complicated by the lord's jurisdictional powers. In the struggle which precedes the Baron's War the grievances of the tenants who stand low in the feudal scale become audible; and this is one chief grievance—on the tenant's death the lord enters the tenement and wastes it; the heir can get no damages. An attempt to redress this grievance was made by the Provisions of 1259; a more successful attempt by the statute of 1267; the heir is to have damages if the lord does any harm, for if the heir is forthcoming and in possession of the land, the lord is entitled to no more than "a simple" or, as we should say, a formal "seisin." . . .

We are thus brought within seventy years of the Conquest. As to what had happened in that interval, we have two emphatic declarations. Henry I. in his coronation charter said: "When any of my barons, earls, or others, who hold of me shall die, his heir shall not redeem, or buy back (*heres suus non redimet*) his land, as he used to do in the time of my brother, but shall relieve it with a just and lawful relief; and in likewise the men of my barons shall relieve their lands from their lords by a just and lawful relief." In the second place, the chronicler when telling how Rufus kept bishoprics and abbeys vacant and made profit out of their temporalities, adds that he desired to be the heir of every man in England, hallowed or lay. We see then that there already was an idea of a just and lawful relief, that William Rufus had exceeded its measure, and had in effect required the heir to purchase his ancestor's land.

LEAKE, LAND LAW, 31-33. The fee or feudal estate in the land appears to have been granted, in early times, for the life of the tenant only, the land reverting to the lord upon a vacancy by death. The grant was afterwards extended to the sons and other issue of the tenant under the designation of heirs, leaving no reversionary interest in

the lord except upon the failure of the heirs so designated.

A grant extending to the heirs was originally confined to the issue or lineal descendants of the first feudatory. Upon his death without issue, his brothers and other collateral relations acquired no claim under such grant; but upon the death of a tenant who had acquired the fee as heir, his collateral relations might succeed as being heirs of the original feudatory. In the former case the fee was distinguished as *feudum novum*; and in the latter, as *feudum antiquum*. The fee might be enlarged in its creation to all the heirs, collateral as well as lineal, by granting the *feudum novum* expressly to be held *ut antiquum*; and such appears in later times to have become the general construction of a grant even without that express addition; at least, in the English common law a grant "to a man and to his heirs" simply, was construed as extending to the heirs general, collateral as well as lineal.

This extension of the term heirs at the same time necessarily required that the restriction of the fee to the lineal heirs, if intended, should be expressed in terms; such grants were accordingly made with the limitation "to the heirs of the body." Similarly, the grant might be restricted "to the heirs male of the body," or to the heirs by a certain wife, or to other restricted lines of issue.

The heir originally derived his title to the fee from the grantor by designation in the grant, *per formam doni*. But as the tenant acquired, in course of time, the power of alienating the fee, the interest of the heir became reduced to a mere expectation of succeeding, in the event of the ancestor not exercising that power. The additional grant "to the heirs" was then referred wholly to the estate of the ancestor, as importing merely an estate of inheritance, an essential incident of which was the power of transferring the land to another for a like estate; and the heir no longer claimed as grantee by designation in the grant, but derived his title from the ancestor by descent.

(c) Alienation.

MAGNA CARTA (1217), c. xxxix. No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him which belongeth to the fee.

c. xliii. It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again, to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom they were received to be holden. If any from henceforth so give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

BRACON, 45. But as regards the power of the donee to make a gift over and to transfer to another the property granted to himself, some might say that he cannot do so, because by this means the lord loses his service; this, however, is not true—with all respect to the chief lords be it said. And speaking generally, the truth is that the donee may grant the property and the land granted to him to whomsoever he pleases, unless there were some special provision against alienation at the time of the feoffment. For when any one makes a gift of a tenement, he gives away an ascertained tenement upon condition of receiving in exchange fixed customs and fixed services, in accordance with what has been said above. And he cannot rightfully claim anything more from the gift; let him therefore take what is his and go his way. . . . Hence when any chief lord hinders his tenant from making a gift, he works him an injury and an open disseisin, in not suffering him to make use of his own property and his own seisin. The tenant, however, by such a gift works no wrong to his lord, although he does him harm; since the lord may have his relief from the feoffee of the tenant, and although the tenant may do

the lord harm, yet the act will not be wrongful for the reason aforesaid. . . .

If my tenant makes a gift, it may be questioned to whom he works a wrong; not to the lord, for the lord has all that belongs to him; and he has the tenement bound and burdened whatever may be the words of gift, and into whosoever hands it may come. Nor does the feoffee injure the lord's rights, because it matters nothing to the chief lord who holds his fee, since the actual tenant is his tenant, although there be an intermediate lord. Further if the lord allege that the tenant has wrongfully entered upon his fee, I say it is not so, because the fee is not the property of the lord, but the tenant, and the lord has nothing in the fee except the services due to him, and thus the fee is the property of the tenant, but subject to services to the lord; and if the lord prohibits the tenant from doing what he pleases with the tenement which he holds in his demesne, this will be an entrance by the lord upon the tenement of his tenant, and will work a disseisin, unless any other consequence follows from any condition or covenant contained in the gift itself, for any one can annex terms and conditions to his gift, and thus create a rule of law which must always be observed.

STAT. WESTM. II. (13 Edw. I., 1285), Cap. 18. When debt is recovered or knowledged in the King's Court, or Damages awarded, it shall be from henceforth in the Election of him that sueth for such Debt or Damages, to have a Writ of *Fieri facias* unto the Sheriff for to levy the Debt of the Lands and Goods; (2) or that the Sheriff shall deliver to him all the Chattels of the Debtor (saving only his Oxen and Beasts of his Plough) and the one half of his Land, until the Debt be levied upon a reasonable Price or Extent. (3) And if he be put out of that Tenement, he shall recover by a Writ of *Novel disseisin*, and after by a Writ of *Redisseisin*, if need be.

STAT. WESTM. III. (18 EDW. I., 1290), QUIA EMPTORES,

c. i. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feofors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance: our lord the King in his parliament at Westminster after Easter the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

c. ii. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

c. iii. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the time com-

ing. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

LIT., § 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should bee good, then the condition should oust him of all the power which the law gives him, which should bee against reason, and therefore such a condition is voide.

Co. LIT., 223, *a*. And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is voide, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth passe. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man bee possessed of a lease for years, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shal not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter, and it is against trade and trafique, and bargaining and contracting betweene man and man; and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* . . .

A man before the statute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heires did alien without license, that he should pay a fine, then this had been good. And so it is said, that the lord might have restrained the alienation of his tenant by condition, because the lord had a possibilitie of reverter;

and so it is in the king's case at this day, because he may reserve a tenure to himselfe.

DIGBY, HIST. REAL PROP., Ch. III., § 14. It appears that about the time of the passing of the provisions quoted above from Magna Carta, strenuous attempts were made in the interest of the great lords to prevent a tenant alienating any part of his land. These attempts, however, were not successful. The provision in Magna Carta given above appears to be the only restraint upon alienation of lands in fee simple ever recognized by law in the interests of the lord. When lands were held of a mesne lord, the effect of this provision seems to have been that if the lands were alienated contrary to the statute the heir of the alienor might enter upon the alienee and defeat his estate. This it was hoped would prevent alienations of portions of the land to the damage of the interests of the lord. The law as to alienation in the case of lands held immediately of the king was different. The subject is very obscure, but it appears probable, as is asserted by Sir E. Coke in his notes on the passage of Magna Carta, that before the reign of Henry III. there was no greater restraint on the alienation of lands held in fee of the Crown than in the case of lands held of a mesne lord; that about this time it was established (whether by this provision of Magna Carta, as Sir E. Coke thinks, or not, is doubtful) that the lands held immediately of the king could not be alienated without incurring liability to a fine for a license of alienation. It continued for a long time to be a question whether such an alienation of lands without license was a cause of forfeiture to the Crown, or whether the king could only distrain for the fine. This doubt was set at rest by 1 Edward III., stat. 2, c. 12, by which it was provided that an alienation without license of lands held of the king in chief should not be a cause of forfeiture, but a reasonable fine should be taken in the Chancery by due process. Henceforth for a license of alienation by a tenant *in capite* the king was held to be entitled to a third part of the yearly

value of the land, and for a fine upon alienation without license to one year's value. These fines upon alienation were abolished by 12 Car. II., c. 24.

Id., Ch. IV., § 2. It appears that the provision in Magna Carta,¹ was construed as an absolute prohibition against granting lands to religious houses. The prohibition is now extended so as to prevent any alienation of lands "*per quod ad manum mortuam deveniant.*" Lands were said to come into a "dead hand" when they were held not by an individual tenant, but by a corporation or body. This expression was probably first applied to the holding of lands by religious bodies or persons who, being "professed," were reckoned dead persons in law. It then came to be applied to the holding of lands by corporations as opposed to individuals, whether the corporation were ecclesiastical or lay, sole or aggregate. . . .

Several exceptions have been introduced in favor of particular corporations or classes of corporations by Act of Parliament, as, for instance, the Universities and Colleges of Oxford and Cambridge, limited companies, and many others. When, however, no license has been obtained from the Crown or been conferred by Act of Parliament, the old rule of law still prevails.

Id., Ch. IV., § 5. It seems that before the passing of this statute [*Quia Emptores*], where *A.* held land in fee simple of *B.*, *A.* might have granted to *C.* the whole of those lands to be held of *B.*; and such a grant would operate to create a tenancy between *C.* and *B.* This relation, however, could not at the common law (that is, independently of the statute presently to be mentioned) have been effected by a grant by *A.* to *C.* of part of the lands held by *A.* At common law, a feoffment made by *A.* to *C.* of a portion of his lands would in every case have created anew the relation of lord and tenant, with all the incidents attaching to that relation, as between *A.* and *C.* In this case there would be no immediate relation of lord and tenant between the chief

¹ Cap. 43, ed. 1217; page 61, *supra*.—ED.

lord and C. The advantageous rights of the lord over the land would consequently be diminished. The land thus aliened would not escheat to the chief lord on the failure of the heirs of the alienee, nor would the lord be the guardian of the lands or of the body of the heir.

To preserve these rights it was in the eighteenth year of Edward I. enacted that every alienation in fee simple, whether of the whole or of a part of the land, should have the effect of substituting the alienee for the alienor in relation to the chief lord; the alienee simply stepping into the place of the alienor, and being subject to all the duties and obligations under which he held the land of his lord. The primary object of this enactment was to prevent the loss arising to the lords of manors from subinfeudation, or subdivision of the tenements held of them. Consequently, whenever at the present day a freehold tenant in fee simple holds of a mesne lord, the separation of the freehold from the domain must have occurred at a date anterior to the eighteenth year of Edward I. From this time forward every alienation of land in fee simple presents the characteristics of a complete out-and-out transfer, the transferee stepping for all purposes into the place of the transferor. Gradually by successive alienations the tie between the chief lord and the freeholder becomes weakened. In socage tenure, when no rent was payable and no value attached to the service, there was no motive for keeping up the empty ceremony of fealty, and thus in many cases the relation of lord and tenant became altogether obliterated. Finally, when all the valuable incidents attaching to knight-service were abolished, and the tenure itself converted into socage by the Statute of Charles (12 Car. II., c. 24), the relation between the freeholder and his lord fell into abeyance, and the freeholder became for all practical purposes owner of the soil. Thus at the present day in the great majority of cases no intermediate lord is recognized between the freeholder and the Crown, except where the freehold is within the known precincts of a manor, and the relation between the freeholder and the

lord of the manor has been kept up by the recognition of mutual rights and duties, such as payment of rent, or rendering heriots or other duties to the lord.

LEAKE, LAND LAW, 19. Before the statute the tenant, though he might by subinfeudation have created a new tenure of himself as lord, could not transfer or get rid of his own tenure, with its attendant duties and services, without the license of the lord. The statute, while disabling him from sub-infeudation, enabled him freely and without license to alien his own tenure.

The statute extends only to the sale or alienation of the entire fee or estate in the land. By aliening the land for a partial or less estate, reserving the ulterior estate in the fee, a species of sub-tenure or imperfect tenure might still be created.

CHAPTER III.

MANORS.

DIGBY, HIST. REAL PROP., Ch. I., sec. II., § 3. It has been said that before the Conquest large districts of land were held by persons or corporations, the dwellers upon which, holding beneficially plots of land, usually of small size, were bound to render services, either in money, kind, or labor, to the lord or supreme landowner of the district. The probable connection of these districts with the Teutonic mark has already been alluded to.¹ It is probable that the Conquest wrought but little immediate change in the relation of such persons to their lord. A Norman lord might be substituted for a Saxon, but the dues and services would substantially continue the same. We now find that these districts receive the name *maneria*, or manors. In Domesday the words *mansio*, *villa*, *manerium* are synonymous. After the Conquest England is parcelled out into manors varying greatly in size; having as a rule fixed boundaries, often coinciding, as is still the case at the present day, with the boundaries of the parish. In some cases manors were diminished or added to, and new manors created. Probably, however, there was no great addition after the Conquest to the number of manors.

It has already been seen that, although the word "manor" is of Norman introduction, substantially the relation of lord of a manor and his tenants existed before the Conquest. It is probable, however, that the idea of the legal relation between the lord and the smaller holders of land within the manor received more exact definition at the hands of Norman lawyers and justices. The lord is regarded in his relation to those below him as lord of the soil; in relation to the

¹ Ch. I. sec. I., § 1.

king or superior lord he is regarded as tenant. He stands in the same relation to the land of the district as the king fills in relation to the land of the whole country. *Prima facie* all rights over the land within the district which are not claimed by any individual are regarded as vested in the lord. The freeholders of land become his tenants; he is not only lord of his men, but lord of the land, he is entitled to escheat on failure of the tenants' heirs, the rights of pasturage on the unoccupied lands enjoyed by the inhabitants of the district come to be regarded as *jura in alieno solo*—rights exercised over the land the ownership of which is vested in the lord. It must be remembered that the king is not only the supreme, but the largest landowner in the country. He is lord of many manors in various districts. What is said therefore of the relation of tenants to their lords must be understood to apply also to the king when he is lord of the manor.

The holders of land within the manor may, for the purposes of legal history, be conveniently divided into the following classes: First, the tenants in knight-service or in chivalry, whose tenure must, if the views above stated be correct, have originated since the Conquest by grant, or commendation involving a regrant. . . . Secondly, there are the freemen, bound to render service, other than military service, in money, produce, attendance at the lord's court, or labor; or rather, as they would be called after the Conquest, free tenants holding by such services. In Domesday we find these tenants spoken of as *sochemanni*, *socmanni*, or *liberi socmanni*. The services to which they were bound seem to have been usually fixed or certain, and not capable of being exacted arbitrarily by the lord, such as the rendering of a certain amount of agricultural service, or paying a fixed rent in money or produce. Sometimes a free tenant would only be bound by the oath of fealty. It seems that in fact the line between the services rendered by free tenants and by the non-free was in many cases not clearly marked. They were doubtless regulated by local customs,

and in some cases free men would be bound to render base services. The important thing was the status of the person rendering the services, not the service rendered. In process of time the nature of the services rendered, especially the characteristic of fixity or certainty, came to be regarded as the mark of a distinct species of freehold tenure called free socage. . . .

Tenants of land holding by any one of the above-mentioned tenures—*libera eleemosyna* or frankalmoign, grand serjeanty, knight-service, socage, burgage, and petit serjeanty—were regarded as freeholders having an estate or interest in lands worthy of a freeman, and involving no service derogatory to the status of freedom. Some time before the reign of Henry II., but apparently not so early as Domesday, the expression *liberum tenementum* was introduced to designate land held by a freeman by a free tenure. Thus freehold tenure is the sum of the rights and duties which constitute the relation of a free tenant to his lord. . . .

Besides the lands of the manor held by free or freehold tenants, the lord retained in his own hands the domain—*terrac dominicales*—portions of which were sometimes let to farmers, and portions cultivated by persons bound to render agricultural services for the benefit of the lord. The Domesday of St. Paul's leaves little doubt that there were frequently, especially upon ecclesiastical lands, *farmers* holding land under conventions or covenants, and rendering for it rent in kind or money. These would probably differ from the tenants in socage, for they would not be bound to the lord by homage or fealty; they would simply hold under the covenant or lease. Specimens of these leases are given in the Domesday of St. Paul's; they are usually for the life of the tenant. The convention was merely binding as between the tenant and the lord, it created no estate as between the tenant and third persons. In later times a lease of land for life becomes a freehold interest held by socage or other tenure; a lease for years becomes a new species of rights over land, called leasehold interests or chattels real.

Besides these there are the non-free inhabitants, a large and important class, by whose forced service the domain of the lord—that is, the land not held of him by freemen rendering free services, or by farmers, was mainly cultivated. We find a variety of names applied in Domesday to this servile peasantry (*e.g.*, *villani*, *nativi*, *custumarii*, *servi*, *cotarii*, *bordarii*). . . . These non-free inhabitants were *adscripti glebae*, tied to the land; they could not remove from one manor to another. They seem to have held plots of land of considerable extent, and the very fact of their not being removable, of son succeeding father in the occupation of his plot, and in the obligation to render services, no doubt gave rise to various customs, or helped to preserve customs already in existence, such as allowing the tenant's eldest or youngest son, or all his sons in equal shares, to succeed to the father's beneficial interests (usually on making some payment to the lord), recognizing estates of inheritance, for life or years, allowing the tenant to feed his cattle on the waste, and the like. These customs virtually gave the non-free tenant rights and duties in relation to his lord, and, as will be seen, grew into local laws. If the tenant could not depart from the land, no more could the lord remove him so long as he rendered the service due to the lord. There would be little distinction between the lowest class of freemen and the highest class of the non-free; the one would gradually pass into the other. Freemen sometimes held lands by villein services. This relation of the non-free inhabitants to the land gradually passes into an interest recognized by custom under the name of *villenagium*, and finally into a tenure protected by law under the name of copyhold or customary tenure.

Such were the various phases of the relation of lord and tenant which took root in the interval between the Conquest and the reign of Henry II. It remains to notice what has from the date of the complete constitution of manors been their most important characteristic—the manorial courts. When a large district comprising several manors was held

by a single lord in whom was vested by grant or long usage the complete jurisdiction of the hundred, the district was called a *liberty* or *honour*. In such a case, there might be, and usually was, only one court held for the whole; but that court was regarded as the court of each several manor. The honour is merely the aggregate of several manors, it has no distinct or separate organization. It is therefore only necessary to inquire into the constitution and nature of the manor courts.

The principal manorial court is the Court Baron, or the assembly of the freehold tenants of the lord. Besides the Court Baron, in many manors there is also a Court Leet, which is sometimes held with the Court Baron; and wherever, as is usually the case at the present day, there are copyholders within the manor, there is also a third court, called the Customary Court. This court, too, is often held with a Court Baron. It is, however, probable that this classification is due to the lawyers of the thirteenth or fourteenth century, and that in early times no distinction between the different courts was recognized. "A Court Baron," says Sir Edward Coke, "is the chief prop and pillar of a manor, which no sooner faileth, but the manor falleth to the ground."¹

The manor courts therefore may be regarded as representing one side of the old assembly of the township, in which the jurisdiction properly belonging to the hundred court has come to be vested. The constitution of the Court Baron is consistent with this view. The freemen, or rather, as they have now come to be, the freehold tenants of the manor, are the judges of the court; the lord or his steward is simply the president. Thus the continuance of a sufficient number of freehold tenants within the manor is essential to the maintenance of the Court Baron, and so to the continuance of the manor itself. The functions of this court were partly administrative, partly judicial. The business relating to the interests of the various dwellers within the manor

¹ Coke, Copyholder, xxxi.

was here transacted; probably in some manors the customs of the manor would from time to time be declared in this court, grants of the waste sanctioned, rights of common regulated. The judicial functions of this court varied in different manors. The Court Leet, held either separately or in conjunction with the Court Baron, had jurisdiction over crimes committed within the manor, and the Court Baron over civil suits arising within the same limits, especially over all matters relating to the freehold. This jurisdiction, however, was gradually curtailed and overridden by the judicial organization carried into effect by Henry II.

Id., Ch. II. It is to the organization of the judicial institutions of the country that the rapid development of the Common Law relating to land which took place in the interval between the beginning of the reign of Henry II. and the end of that of Henry III. is owing. It has been seen, in the preceding chapter, that in the various manors the manor court had jurisdiction over questions arising within the manor. But supreme over all was the King's Court (*Curia Regis*), which partook of the character of the supreme Court Baron, and was also the chief national legislative and judicial institution of the country.¹ The king, in his combined capacity of sovereign of the nation and lord paramount of all the land, asserted his right to adjudicate by himself or his representatives upon all questions relating to the freehold, and to control the local jurisdictions of the lords of the manors. The jurisdiction of the royal or central court was exercised partly at Westminster or elsewhere, where the king's court happened to be in attendance upon the king's person, partly by the organization of *itineria* or progresses by members of the *Curia Regis* for judicial and other purposes throughout the country.

¹ As to the *Curia Regis*, see Stubbs, *Select Charters*, pp. 22, 131 and 141, and *Const. Hist.*, i., pp. 598-604.

CHAPTER IV.

SEISIN.

LIT., § 324. Also, when a man will shew a feoffement made to him, or a gift in taile, or a lease for life of any lands or tenements, ther he shal say, by force of which feoffement, gift, or lease, he was *seised*, &c., but where one will plead a lease or grant made to him of a chattell real or personal, ther he shal say, by force of which he was *possessed*, &c.

Co. LIT., 153, a. "*Seisin*," or *seison*, is common aswel to the English, as to the French, and signifies in the common law possession, whereof *seisina*, a Latin word, is made, and *seisire*, a verbe.

ID., 200, b. *Seisin* is a word of art, and in pleading is onely applied to a freehold at least, as *possesse* for distinction sake is to a chattell reall or personall. As if *B.* plead a feoffement in fee, he concludeth, *virtute cujus praedict. B. fuit seisitus, &c.* But if he plead a lease for yeares, he pleadeth, *virtute cujus praedictus B. intravit, et fuit inde possessionatus*; and so of chattells personalls, *virtute cujus fuit inde possessionatus*.

And this holdeth not only in case of lands or tenements which lie in liverie, but also of rents, advowsons, commons, &c., and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by liverie, he is not to plead any entrie, for he is in actuall *seisin* by the liverie itselfe. Otherwise it is of a lease for yeares, because there he is not actually possessed untill an entrie.

ID., 266, b. *Seisin* is a technical term denoting the

completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a descent the person on whom the lands descend has not actually entered and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But in opposition to what may be termed the expectant nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the actual seisin of the lands. The fee is entrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee. *Disseisin* seems to imply the turning the tenant out of his fee, and usurping his place and relation.—*Butler's note*, 217.

POLL. & W., POSSESSION, 47-49. Possession of land is of two kinds. Seisin signifies in the common law possession, but one cannot be seised, in the language of modern lawyers, as of any interest less than freehold.

Where a tenant occupies a close under a lease for years, the tenant has possession of the close, so that not only a stranger, but the freeholder himself, may be guilty of a trespass against him, but the freeholder is still seised, or, as the judges could say as late as 1490, possessed, of the freehold. The fundamental maxim that there cannot be two possessions of the same thing at the same time is evaded, successfully or not, by treating the land itself and the reversion as different things. Mr. F. W. Maitland's research has thrown much light on this curious compromise between incompatible ideas. He has shown by abundant examples that in the thirteenth century seisin and possession were absolutely synony-

mous terms, and that as late as the fifteenth century seisin of chattels was commonly spoken of in pleading. But as early as the thirteenth century the introduction of tenant-farming raised for thinking English lawyers the question who had possession, the landlord or the tenant. Bracton, following Roman authority and the Roman distinction between *possidere*, i.e., possession in law, and *in possessione esse*, i.e., physical possession, in one passage boldly said of the tenant-farmer "talīs non possidet licet fuerit in seīsina;" he is like a bailiff or servant. But in another passage, which is followed by Fleta, we find the theory of a double seisin: "poterit enim quilibet illorum sine praeiudicio alterius in seīsina esse eiusdem tenementi, unus ut de termino et alius ut de feodo vel libero tenemento." . . . In any case, practical need carried the day. It would not do to say that the freeholder had parted with his seisin, for that would have cut him off from using in support of his title the convenient possessory remedies given by the assize of novel disseisin and other actions of the same class. According to the later authorities, though a man who has made a lease for years "cannot of right meddle with the demesne nor the fruits thereof," he may have an assize if the termor is ejected, and may plead that he was seised in his demesne as of fee. It would not do to say that the farmer had no possession, for he, too, must have an effectual remedy against intruders; if he is not exactly disseised when he is disturbed without right it is somethnig very like it. . . . Thus it was settled that the lessee had a kind of seisin and yet the lessor did not lose the seisin which he had before. It must be remembered that gradations of freehold tenure had already made men familiar with the conception of the lord being seised of rent and service while the tenant was seised of the land itself. Not before Littleton's time (if so early) it became the usage to confine the term seisin to estates of freehold; and accordingly we have a double terminology, corresponding to a double set of rights, and (so long as the real actions were in practical use) also of remedies.

2 POLL. & MAIT., HIST. ENG. LAW, 29. In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences.

Id., 39. On the whole we may say that the possession of land which the law protects under the name of a "seisin of freehold" is the occupation of land by one who has come to it otherwise than as tenant in villeinage, tenant at will, tenant for term of years or guardian, that occupation being exercised by himself, his servants, guardians, tenants in villeinage, tenants at will, or tenants for term of years. This seems the best statement of the matter—occupation of land is seisin of free tenement unless it has been obtained in one of certain particular ways. If, however, we prefer to look at the other side of the principle, we may say that the *animus* required of the person who is "seised of free tenement" is the intent to hold that land as though he were tenant for life or tenant in fee holding by some free tenure.

II. The Feudal Tenures.

CHAPTER I.

THE FREEHOLD TENURES.

BRACTON, 207. Mention is sometimes made of a *free* tenement by way of distinction from that which is held in villeinage, for of tenements some are free and some are villein tenements.

Also of free tenements some are held freely by homage and military service, some are held in free socage by fealty alone, or, as some say, by fealty and homage. Also of free tenements some are held in absolute and free and perpetual alms; these indeed are as much the property of man as of God, for they are given not only to God and to such a church, but to the abbots and priors who there serve God. There is also the tenement which is given by the tenure of free alms to the rectors of churches, of which there are two kinds, one more absolute and free than the other. One is given by way of endowment at the dedication of the church, and the other after dedication.

Id., 37. Also a person may be enfeoffed by another to hold by rendering different kinds of services; for instance, by the service of paying one penny, and rendering scutage, and by one or more kinds of personal service. Hence, if the service consists only in paying money, and there be no scutage or serjeanty, or if the tenant be bound to two different things disjunctively, for instance, to give a certain thing in lieu of all service, or a certain sum in money, in

that case the tenement may be called a socage tenement. If, however, there be in addition scutage or service due to the king, even to the amount of no more than a halfpenny, or serjeanty, the tenement in that case may be called a military fee.

LIT., § 95. *Escuage* is called in Latine *Scutagium*, that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee, ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.

§ 111. Also, divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in *England*. And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeantie. But in all cases where a man holds by knight's service, this service draweth to the lord ward and mariage.

§ 117. Tenure in socage is, where the tenant holdeth of his lord the tenancie by certeine service for all manner of services, so that the service be not knights service. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of services; or else where a man

holdeth his land by homage, fealty, and certaine rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itselfe maketh not knights service.

§ 118. Also, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalrie, is a tenure in socage.

Co. Lit., 86, a. Here *Littleton* speaketh of tenures of common persons; for grand serjeantie is not knights service, and yet it is not a tenure in socage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest, and as in his proper place shall appeare more at large. Also here *Littleton* speaketh of socage largely taken, and so called *ab effectu*, that is, all tenures that have the like effects and incidents belonging to them as socage hath, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, a rent, and such like were reserved, or that the tenants in *condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant*, these are said to be tenures in socage *ab effectu*, for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knights service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modis juxta quantitatem perpetrati sceleris puniat*, (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causa*, and some, and the greater part, *ab effectu*. . . . But it is a presumption where homage is due, that the land is holden by knight's service, as hath beene said.

LIT., § 119. And it is said, that the reason why such tenure is called and hath the name of tenure in socage is this: because *socagium idem est quod servitium socae*, and *soca idem est quod caruca*, &c., i.e., a soke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughes, every of the said tenants for certaine daies in the yeare to plough and sow the demesnes of the lord. And for that such workes were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure in socage. And afterward these services were changed into money, by the consent of the tenants and by the desire of the lords, viz., into an annual rent, &c. But yet the name of socage remaineth, and in divers places the tenants yet doe such services with their ploughes to their lords; so that all manner of tenures, which are not tenures by knight's service, are called tenures in socage.

§ 120. Also, if a man holdeth of his lord by escuage certaine, *scil.* in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but halfe a marke for escuage, and no more nor lesse, to how great a sum, or to how little the escuage runneth, &c., such tenure is tenure in socage, and not knight's service. But where the summe which the tenant shall pay for escuage is uncertaine, *scil.* where it may be that the summe that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, according as it is assessed, &c., such tenure is tenure by knight's service.

§ 121. Also, if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in socage. But where the tenant ought by himself or by another to doe castle-gard, such tenure is tenure by knight's service.

§ 122. Also, in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

§ 133. Tenant in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say, in Latine, *in liberam elemosinam*, that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; or by such words, to hold of the grantor, or of the lessor, and his heires in free almes: in such case the tenements were holden in frankalmoigne.

§ 135. And they, which hold in frankalmoigne, are bound of right before God to make orisons, prayers, masses, and other divine services for the soules of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall doe no fealty to their lord; because that this divine service is better for them before God, then any doing of fealty; and also because that these words (frankalmoigne) exclude the lord to have any earthly or temporal service, but to have onely divine and spirituall service to be done for him, &c.

§ 143. Tenant by homage auncestral is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestours, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestrell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie in the blood of the lord. And such service of homage ancestrall draweth to

it warrantie, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestrel.

§ 153. Tenure by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlaines of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service than the service in the tenure of escuage. For he which holdeth by escuage is not limited by his tenure to do any more especiall service then any other which holdeth by escuage ought to doe. But he which holdeth by grand serjeanty ought to doe some speciall service to the king, which he, that holds by escuage, ought not to doe.

Co. Lit., 105, *b*. Serjeanty commeth of the *French* word *serjeant*, *i.e.*, *satelles*, and *serjeantia idem est quod servitium*. And it is called *magna serjeantia*, or *serjanteria* or *magnum servitium*, great service, as well in respect of the excellency and greatnesse of the person to whom it is to be done (for it is to be done to the king only) as of the honour of the service itselfe; and so *Littleton* himselfe in this section saith that it is called *magna serjeantia*, or *magnum servitium*, because it is greater and more worthy than knight's service, for this is *revera servitium regale*, and not *militare* onely.

106, *a*. This great service to the king may (as it appeareth hereby) concerne the warres and matters military; for some grand serjeanties are to be done in the time of war for the safety of the realme; and some in time of peace, for the honour of the realme. . . .

If the king giveth lands to a man to hold of him to be his marshall of his host, or to be marshall of *England*, or to be constable of *England*, or to be high steward of *England*, chamberlayne of *England*, and the like, these are grand serjanties; and these and such like grand serjanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. . . . It is also a tenure by grand serjanty to hold by any office to be done in person concerning the receipt of the king's treasure . . . or by any office concerning the administration of justice, *quia justitia firmatur solium*.

LIT., § 156. Also, it is said, that in the marches of *Scotland* some hold of the king by cornage, that is to say, to winde a horne, to give men of the countrie warning when they heare that the Scots or other enemies are come or will enter into *England*; which service is grand serjeanty. But if any tenant hold of any other lord, then of the king, by such service of cornage, this is not grand serjeanty, but it is knights service, and it draweth to it ward and mariage, for none may hold by grand serjeanty but of the king only.

§ 158. And note, that all which hold of the king by grand serjanty, hold of the king by knights service; and the king forthis shall have ward, mariage, and reliefe; but he shall not have of them escuage, unlesse they hold of him by escuage.

§ 159. Tenure by petite serjeanty is, where a man holds his land of our soveraigne lord the king, to yeeld to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yeeld such other small things belonging to warre.

§ 160. And such service is but socage in effect; because that such tenant by his tenure ought not to goe, nor do anything, in his proper person, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

§ 161. And note, that a man cannot hold by grand serjeanty, nor by petite serjeanty, but of the king, &c.

§ 162. Tenure in burgage is, where an ancient burrough is, of which the king is lord, and they, that have tenements within the burrough, hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certaine rent by yeare, &c. And such tenure is but tenure in socage.

§ 163. And the same manner is, where another lord spirituall or temporall is lord of such a borrough, and the tenants of the tenements in such a borrough hold of their lord to pay, each of them yearly, an annual rent.

§ 164. And it is called tenure in burgage, for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes called burroughes be the most ancient towns that be within *England*; for the townes that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes called boroughes, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

§ 165. Also, for the greater part, such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heire unto his father by force of the custome; the which is called *borough English*.

§ 210. But in the county of *Kent*, where lands and tenements are holden in gavel-kinde, there, where, by the custome and use out of minde of man, the issues male ought equally to inherite, this custome is allowable, because it standeth with some reason; for every sonne is as great a gentleman as the eldest sonne is, and perchance will grow to greater honour and valour, if he hath anything by his ancestors, or otherwise peradventure he would not encrease so much, &c.

Co. Lit., 140, a. "*In the county of Kent.*" For that in no county of *England* lands at this day be of the nature of gavelkinde of common right, saving in Kent onely. But yet in divers parts of *England*, within divers mannors and seignories, the like custom is in force.

LIT., § 211. Also, where by the custome called *burrough English* in some burrough, the yongest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the yonger sonne (if he lacke father and mother) because of his yonger age, may least of all his brethren helpe himselfe, &c.

2 BL. COM., 62. The first, most universal, and esteemed the most honorable species of tenure, was that by knight-service, called in Latin *servitium militare* and in law-French, *chivalry*, or *service de chivaler*; answering to the *fief d'haubert* of the Normans, which name is expressly given it by the *Mirrou*.¹ This differed in very few points from a pure and proper feud, being entirely military, and the general effect of the feudal establishment in England. To make a tenure by knight-service a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which, in 3 Edw. I., was estimated at twelve plough-lands, and its value (though it varied with the times) in the reigns of Edward I. and Edward II. was stated at £20 *per annum*. And he who held this proportion of land (or a whole fee) by knight-service was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. And there is reason to apprehend that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently

¹ C. 2, § 27.

superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry—namely, aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.

Id., 73-75. There were also some other species of knight's service, so called, though improperly, because the service, or render, was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight's service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer at his coronation. It was in most other respects like knight-service; only he was not bound to pay aid, or escuage, and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satis-

faction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money; and in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary instead of a military service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants—that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments in the time of Henry II. seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamor; and King John was obliged to consent, by his *magna carta*, that no scutage should be imposed without consent of parliament. But this clause was omitted in his son Henry III.'s charter, where we only find that scutages, or escuage, should be taken as they were used to be taken in the time of Henry II., that is, in a reasonable and moderate manner. Yet afterwards, by statute 25 Edw. I., ch. 5, 6, and many subsequent statutes, it was again provided that the king should take no aids or tasks but by the common assent of the realm; hence it was held in our old books that escuage or scutage could not be levied but by consent of parliament; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since, therefore, escuage differed from knight-service in nothing but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton¹ must be understood when he tells us that tenant by homage, fealty, and escuage was tenant by knight-service, that is, that this tenure (being subservient to the mili-

¹§ 103.

tary policy of the nation) was respected as a tenure in chivalry. But as the actual service was uncertain and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage, of which we shall speak in the next chapter.

Id., 78-81. The military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honorable services, but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles II.) almost every other species of tenure. . . .

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton:¹ If a man holds by rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*;" but if you add thereto any royal service, or escuage, to any the smallest amount, "*illud dici poterit feodum militare*." So, too, the author of Fleta:² "*Ex donationibus, servitia militaria vel magnae serjantie non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also³ defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards⁴ he tells us, that whatsoever is not

¹ L. 2, c. 16, § 9.

² L. 3, c. 14, § 9.

³ § 117.

⁴ § 118.

tenure in chivalry is tenure in socage: in like manner as it is defined by Finch,¹ a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20s. rent; or by homage, fealty, and 20s. rent; or by homage and fealty without rent; or by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only, without any other service; for all these are tenures in socage.

But socage, as was hinted in the last chapter, is of two sorts: *Free-socage*, where the services are not only certain but honorable; and *villein-socage*, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvill² and other subsequent authors by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak; and this, both in the nature of its service and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word:³ who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and being joined to a usual termination, is called *socage*, in Latin *socagium*; signifying thereby a free or privileged tenure. This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service.⁴ But this by no means agrees with what Littleton himself tells us,⁵ that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services confessedly of a military nature and original (as

¹ L. 147. ² L. 3, c. 7. ³ Gavelk. 138. ⁴ Litt. § 119. ⁵ § 118.

escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty changed both their name and nature, and were called socage. It was the *certainty*, therefore, that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*,¹ tells us that they are "lands and tenements, whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded." Which leads us also to another observation, that if socage tenures were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunke ferme* or tenure by socage. We may therefore, I think, fairly conclude in favor of Somner's etymology, and the liberal extraction of the tenure in free-socage, against the authority even of Littleton himself.

Taking this, then, to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty, retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honorable, but, at the same time, more burthensome tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

¹ C. 66.

As, therefore, the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*. . . .

Id., 84-85. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of all her husband's tenements, and not of the third part only, as at the common law; and that, in others, a man might dispose of his tenements by will, which, in general, was not permitted after the Conquest till the reign of Henry VIII.; though in the Saxon times it was allowable. A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

The nature of the tenure in gavelkind affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind (though it was and is to be found in some other parts of the kingdom), we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion that gavelkind before the Norman Conquest was the general custom of the realm. The distinguishing properties of this tenure are various. Some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend not to the eldest, youngest, or any one son only, but to all the sons together; which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in

a most remarkable manner; and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain. Wherefore, by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to exchange the gavelkind tenures holden of the See of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII., ch. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now, the immunities which the tenants in gavelkind enjoyed were such as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

I POLL. & MAIT., HIST. ENG. LAW, 230-234. *Knight's Service*.—In some of our modern books military tenure has a definiteness and a stability which it never had elsewhere. An army is settled on the land, is rooted in the land. The grades in "the service" correspond to, and indeed are, the grades of landholdership; the supreme landlord is commander-in-chief; each of his immediate tenants is the general of an army corps; the regiments, squadrons, companies, answer to honors or manors or knight's fees. All is accurately defined; each man knows his place, knows how many days he must fight and with what arms. This "feudal system" is the military system of England from the Norman Conquest onward throughout the middle ages; by means of it our land is defended and our victories are won in Wales and in Ireland, in Scotland and in France. When, however, we look at the facts, all this definiteness, all this stability, vanish. We see growth and decay; we see decay beginning before growth is at an end. Before there is much law about military tenure it has almost ceased to be military in any

real sense. We must have regard to dates. Every one knows that the military tenure of Charles I.'s reign was very different from the military tenure of Edward I.'s; but this again was very different from the military tenure of Henry I.'s or even of Henry II.'s reign.

Soon after the Conquest a process begins whereby the duty of service in the army becomes rooted in the tenure of land. This goes on for a century; but before it is finished, before the system of knight's fees has been well ordered and arranged, the kings are already discovering that the force thus created is not what they want, or is not all that they want. It may serve to defend a border, to harry Wales or Scotland for a few weeks in the summer, but for continuous wars in France it will not serve; the king would rather have money; he begins to take scutages. This, as we shall soon see, practically alters the whole nature of the institution. Another century goes by, and scutage itself has become antiquated and unprofitable; another, and scutage is no longer taken. Speaking roughly we may say that there is one century (1066-1166) in which the military tenures are really military, though as yet there is little law about them; that there is another century (1166-1266) during which these tenures still supply an army, though chiefly by supplying its pay; and that when Edward I. is on the throne the military organization which we call feudal has already broken down and will no longer provide either soldiers or money save in very inadequate amounts. However, just while it is becoming little better than a misnomer to speak of military tenure, the law about military tenure is being evolved, but as a part rather of our private than of our public law. The tenant will really neither fight nor pay scutage, but there will be harsh and intricate law for him about the reliefs and wardships and marriages that his lord can claim because the tenure is military. Thus in speaking of tenure by knight's service as it was before the days of Edward I., we have to speak not of a stable, but of a very unstable institution, and if of necessity we describe it in general terms.

this should not be done without a preliminary protest that our generalities will be but approximately true. As to scutage, in the whole course of our history this impost was levied but some forty times, and we cannot be certain that the method of assessing and collecting it remained constant. An English lawyer turning to study the history of these matters should remember that if Littleton had cared to know much about them, he would have had to devote his time to antiquarian research.

By far the greater part of England is held of the king by knight's service (*per servitium militare*); it is comparatively rare for the king's tenants in chief to hold by any of the other tenures. In order to understand this tenure we must form the conception of a unit of military service. That unit seems to be the service of one knight or fully armed horseman (*servitium unius militis*) to be done to the king in his army for forty days in the year, if it be called for. In what wars such service must be done, we need not here determine; nor would it be easy to do so, for from time to time the king and his barons have quarrelled about the extent of the obligation, and more than one crisis of constitutional history has this for its cause. It is a question, we may say, which never receives any legal answer.

Even the limit of forty days seems to have existed rather in theory than in practice, and its theoretic existence can hardly be proved for England out of any authoritative document. . . .

No serious war could be carried on by a force which would dissipate itself at the end of forty days, and it seems probable that the king could and did demand longer service, and was within his right in so doing, if he tendered wages, or if, as was sometimes the case, he called out but a fractional part of the feudal force. We have to remember that the old duty of every man to bear arms at least in defensive warfare, was never—not even in France—completely merged in, or obliterated by, the feudal obligation. Just when there seems a chance that this obligation may become

strictly defined by the operation of the law courts, the king is beginning to look to other quarters for a supply of soldiers, to insist that all men shall be armed, to compel men of substance to become knights, even though they do not hold by military tenure, and to issue commissions of array.

Id., 271-275. *Socage*.—Any tenure that on the one hand is free and on the other hand is not spiritual, nor military, nor “serviential,” is called tenure in free socage:—to this result lawyers are gradually coming. Obviously therefore this term *socage* will cover a large field; it will include various relationships between men, which, if we regard their social or economic or even their purely legal aspects, seem very different from each other. We may look at a few typical cases.

(a) The service which the tenant owes to his lord may be merely nominal; he has no rent to pay or has to give but a rose every year just by way of showing that the tenure exists. Such a case may be the effect of one of various causes. It may originate in what we should call a family settlement: a landowner sometimes provides for a daughter or a younger son by a gift of land to be held by a nominal service. Or, again, the gift may be a reward to some dependant for past services, or a retaining fee for services to be rendered hereafter, which services, however, are not defined and are not legally exigible. Or, again, there may well have been what in truth was a sale of the land: in return for a gross sum a landowner has created a nominal tenure. To have put the purchaser in the vendor’s place might have been difficult, perhaps impossible; so the purchaser is made tenant to the vendor at an insignificant rent.

(b) Such cases gradually shade off into others in which a substantial rent has been reserved. We pass through the very numerous instances in which the lord is to receive yearly some small article of luxury, a sparrowhawk, a pair of gloves, a pair of gilt spurs, a pound of pepper or of incense or of wax, to other cases in which the rent, if we cannot call it a “rack rent,” is “the best rent that can reason-

ably be gotten." We thus enter the sphere of commerce, of rents fixed by supply and demand.

Such tenures as these may be found in every zone of the territorial system. The tenant may be holding of the king in chief; the king has, as we should say, granted perpetual leases at substantial rents of some of his manors, the lessees being sometimes lay barons, sometimes religious houses. Again, from the Conquest onward, to say nothing of an earlier time, very great men have not thought it beneath them to hold church lands at easy rents. It is an accusation common in monastic annals that the abbots of the Norman time dissipated the lands of their houses by improvident grants to their foreign kinsmen or by taking fines instead of reserving adequate rents. In such cases these tenants in socage may have other tenants in socage below them, who will pay them heavier rents. Ultimately we come to the actual occupant of the soil, whose rent will in many cases represent the best offer that his landlord could obtain for the land. Occasionally he may be paying more for the land than can be got from the villeins of the same village.

(c) Sometimes we find in charters of feoffment that the feoffee, besides paying rent, is to do or get done a certain amount of agricultural labor on his lord's land; so much ploughing, so much reaping. The feoffee may be a man of mark, an abbot, a baron, who will have many tenants under him and will never put his hand to the plough. These cases are of importance because they seem to be the channel by which the term *socage* gradually spreads itself.

(d) Finally, within a manor there often are tenants bound to pay divers dues in money and in kind and bound to do or get done a fixed quantity of agricultural service for their lords. Their tenure is often regarded as very old; often they have no charters which express its terms. Hereafter we shall see that it is not always easy to mark the exact line which separates them from the tenants in villeinage among whom they live and along with whom they labor for the lord's profit. Some of them are known as free

sokemen (*sokemanni*, *sochemanni*); but this name is not very common except on "the ancient demesne" of the Crown. . . .

Now, to all appearance the term *socage*, a term not found in Normandy, has been extending itself upward; a name appropriate to a class of cultivating peasants has begun to include the baron or prelate who holds land at a rent, but is not burdened with military service. Of such a man it would seem natural to say that he holds at a rent (*tenet ad censum*), and for a century and more after the Norman Conquest it is rare to call his tenure socage. He is sometimes said to have *feodum censuale*; far more commonly he is said to hold "in fee farm." This term has difficulties of its own, for it appears in many different guises; a feoffee is to hold in *feofirma*, in *feufirmam*, in *fedfirmam*, in *feudo firmam*, in *feudo firma*, *ad firmam féodalem*, but most commonly, in *feodi firma*. The old English language had both of the words of which this term is compounded, both *feoh* (property) and *feorm* (rent); but so had the language of France, and in Norman documents the term may be found in various shapes, *firmam fedium*, *feudifirmam*. But, whatever may be the precise history of the phrase, to hold in fee farm means to hold heritably, perpetually, at a rent; the fee, the inheritance, is let to farm. This term long struggles to maintain its place by the side of socage; the victory of the latter is not perfect even in Bracton's day; the complete merger of fee farm in socage is perhaps due to a statute of Edward I., though the way toward this end had long been prepared.

As to the word *socage*, a discussion of it would open a series of difficult problems about the administration of justice in the days before the Conquest. . . . Bracton believed—erroneously no doubt, but erroneous etymology is a force in the history of the law—that socage had to do with *soc*, the French word for a ploughshare; tenants in socage therefore are essentially agriculturists, and the duty of ploughing the lord's demesne is the central feature of soc-

age. In the second place, if we turn to the true derivation, we come to much the same result; socage is at starting the tenure of those *sokemen* of whom we read in Domesday book; *socage* is an abstract term which describes their condition. Gradually it has been extended and therefore attenuated until it is capable of expressing none but negative characteristics—socage is a tenure which is not spiritual, not military, not serviential. No similar extension has been given to the word *sokeman*; in the thirteenth century many persons hold in socage who would be insulted were they called sokemen; for the sokemen are a humble, though it may be a well-to-do class.

That they have been a numerous class we may gather as from other evidence so from this, that socage becomes the one great standing contrast to military tenure, and as the oppressive incidents of military tenure are developed, every man who would free his holding from the burdens of wardship and marriage is anxious to prove that he holds in socage. To gain this end he is full willing to sink somewhat of dignity; he will gladly hold by the peasant's tenure when the most distinctive marks of that tenure are immunities—no scutage, no wardship, no marriage.

CHAPTER II.

INCIDENTS OF FEUDAL TENURE.

STAT. I HEN. I., cc. 3, 4 (1100). If any of my barons or other men wishes to give his daughter, or sister, or niece, or cousin in marriage, let him speak with me; but I will neither take anything of his for the license, nor will I forbid him to give her away, unless it be to an enemy of mine. And if on the death of one of my barons or other men he leaves a daughter as heir, I will give her with her land by the counsel of my barons. If he leaves a widow, who is without children, she shall have her dower and marriage portion, and I will not give her in marriage against her will. If she has children, she shall have her dower and marriage portion while she remains chaste, and I will not give her unless with her consent. And the wife or some other relative who has the best claim shall be guardian of the land and of the children. And I bid my barons keep within the same bounds as regards the sons, daughters and wives of their men.

MAGNA CARTA (1215), c. 2. If any of our earls or barons, or any other which hold of us in chief by knight's service, die, and at the time of his death his heir be of full age, and oweth to us relief, he shall have his inheritance by the old relief; that is to say, the heir or heirs of an earl, for a whole earldom, by one hundred pounds; the heir or heirs of a baron, for a whole barony, by one hundred marks; the heir or heirs of a knight for one whole knight's fee, one hundred shillings at the most; and he that hath less shall give less, according to the old custom of the fees.

c. 3. But if the heir of any such be within age, his lord

shall not have the ward of him, nor of his land, before that he hath taken of him homage; and after that such an heir hath been in ward, when he is come to full age, that is to say, to the age of one and twenty years, he shall have his inheritance without relief and without fine; so that, if such an heir, being within age, be made knight, yet, nevertheless, his land shall remain in the keeping of his lord unto the term aforesaid.

c. 6. Heirs shall be married without disparagement.

c. 15. We will not give leave to any one, for the future, to take an aid of his own freemen, except for redeeming his own body, and for making his eldest son a knight, and for marrying once his eldest daughter; and not that unless it be a reasonable aid.

c. 39 (1217). No freeman from henceforth shall give or sell any more of his land but so that of the residue of the lands the lord of the fee may have the service due to him which belongeth to the fee.

MAGNA CARTA (1225), c. 7, § 6. No widow shall be distrained to marry herself; nevertheless she shall find surety that she shall not marry without our license and assent (if she hold of us), nor without the assent of the lord, if she hold of another.

STAT. MERTON (20 HEN. III. 1235), c. 7. If an heir, of what age soever he be, will not marry at the request of his lord, he shall not be compelled thereunto; but when he cometh to full age he shall give to his lord and pay him as much as any would have given him for the marriage, before the receipt of his land, and that whether he will marry himself, or not; for the marriage of him that is within age of mere right pertaineth to the lord of the fee.

STAT. WESTM. I. (3 EDW. I. 1275), c. 36. Forasmuch as before this time reasonable aid to make one's son knight, or marry his daughter was never put in certain, nor how

much should be taken, nor at what time, whereby some levied unreasonable aid, and more often than seemed necessary, whereby the people were sore grieved: it is provided that from henceforth of an whole knight's fee there be taken but 20s., and of 20 pound land holden in socage 20s., and of more, more, and of less, less; after the rate. And that none shall levy such aid to make his son knight until his son be fifteen years of age; nor to marry his daughter until she be of the age of seven years. And of that there shall be made mention in the king's writ, formed on the same, when any will demand it. And if it happen that the father, after he hath levied such aid of his tenants, die before he hath married his daughter, the executors of the father shall be bound to the daughter for so much as the father received for the aid. And if the father's goods be not sufficient, his heir shall be charged therewith unto the daughter.

STAT. I. EDW. III. ST. 2 (1326), c. 12. Whereas, divers people of the realm complain themselves to be grieved, because that lands and tenements which be holden of the king in chief, and aliened without license, have been seized heretofore into the king's lands, and holden as forfeit; the king shall not hold them as forfeit in such case, but will and grant from henceforth, of such lands and tenements so aliened, there shall be reasonable fine taken in the Chancery, by due process.

LIT., § 85. *Homage* is the most honorable service, and most humble service of reverence, that a frank tenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneele before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I claime to hold of you,

saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him.

§ 91. *Fealty* is the same that *fidelitas* is in Latine. And when a freeholder doth fealty to his lord, he shal hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

§ 103. *Tenure* by homage, fealty and escuage is to hold by knight's service, and it draweth to it ward, mariage and reliefe. For when such tenant dyeth, and his heire male bee within the age of 21 yeares, the lord shall have the land holden of him untill the age of the heire of 21 yeares; the which is called full age, because such heire, by intendment of the law, is not able to doe such knights service before his age of 21 yeares. And also if such heire be not married at the time of the death of his ancestor, then the lord shall have the wardship and mariage of him. But if such tenant dieth, his heire female being of the age of 14 yeares or more, then the lord shall not have the wardship of the land, nor of the bodie; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of 14 yeares, and unmarried at the time of the death of her ancestor, the lord shal have the wardship of the land holden of him until the age of such heire female of 16 yeares; for it is given by the statute of W. 1, cap. 22, that by the space of two yeares next ensuing the sayd 14 yeares, the lord may tender convenable mariage without disparagement to such heir female. And if the lord within the said two yeares do not tender such mariage, &c., then she at the end of the said 2 yeares may enter, and put out her lord. But if such heire female be

married within the age of 14 yeres in the life of her ancestor, and her ancestor dieth, she being within the age of 14 yeares, the lord shall have only the wardship of the land untill the end of the 14 yeares of age of such heire female. and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender mariage to her which is married, &c. . . .

Co. Lit., 76, a. So as regularly there be sixe incidents to knights service, viz., two of honour and submission, as Homage and Fealtie, and foure of profit, viz., Escuage, whereof he hath treated before, Ward (*i.e.*, wardship of the land), Mariage and Reliefe; of all which our author hath spoken. But there be other incidents to knights service besides these; as *Aide pur faire fite chivalier, et aide pur file marier, &c.*, which at the common law were uncertain, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paide: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading.

Lit., § 110. And of heires males, which be within the age of 21 yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of 21 yeares. And it is to be understood that the heire in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heire covenable mariage within the age of 21 yeares without disparagement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the mariage of such heire male. But if such heire marrieth himself within the age of 21 yeares

against the will of the gardein in chivalrie, then the gardein shall have the double value of the marriage by force of the statute of *Merton* aforesaid, as in the same statute is more fully at large comprised.

§ 112. And if a tenant which holdeth of his lord by the service of a whole knight's fee, dieth, his heire then being of full age, *scil.* of 21 yeares, then the lord shall have 100s. for a reliefe, and of the heire of him which holds by the moitie of a knight's fee, 50s. and of him which holds by the fourth part of a knight's fee 25s., and so he which holds more, more, and which lesse, lesse.

§ 123. Also, in such tenures in socage, if the tenant have issue and die, his issue being within the age of 14 yeares, then the next friend of that heire, to whom the inheritance cannot descend, shall have the wardship of the land and of the heire untill the age of 14 yeares, and such gardein is called gardein in socage. For if the land discend to the heir of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land discend to the heire of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heyre cometh to the age of 14 yeares complete, he may enter and oust the gardian in socage, and occupy the land himselfe, if he will. And such gardian in socage shal not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shal render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 yeares. But such gardian upon his account shall have allowance of all his reasonable costs and expenses in all things, &c.

Co. Lit., 88, *b*. And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder of felony or treason; because he hath nothing to his own use, but to the use of the heire.

LIT., § 125. Also, if gardian in chivalrie makes his executors and die, the heire being within age, &c., the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversitie is, because the gardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the heire. And in this case where the gardian in socage dyeth before any account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors, but for the king onely.

§ 126. Also, the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c., if the tearmes of payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shal have of the heire his tenant as much as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine terms of the yeare, then the heire shall pay to the lord ten shillings for relief beside the tenne shillings which he payeth for the rent.

Co. LIT., 91, a. But it is to be noted that beside relief, whereof *Littleton* here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteene years, and to marry his daughter at the age of 7 yeares.

LIT., § 131. And for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (as shall be said in the tenure of frankalmoigne), and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold

of his lord by fealty onely; and when he hath done his fealty he hath done all his services.

Co. Lit., 93, a. But where the tenure is by fealty only, there is no reliefe due for the cause abovesaid.

Co. Lit., 13, a. *Escheat, eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*), *cadere*, *excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiae* or *terre excadentiales*. *Dominus verò capitalis loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco haeredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.* . . . So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis*, i. e., for default of heir, *aut per delictum tenentis*, i. e., for felonie, and that is by judgment three manner of waies, *aut quia suspensus per collum*, *aut quia abjuravit regnum*, *aut quia utlegatus est*. And therefore, they which are hanged by martiall law *in furore belli* forfeit no lands; and so in like cases escheats by the civilians are called *caduca*.

I POLL. & MAIT., HIST. ENG. LAW., 332. *Escheat and Forfeiture*.—In the background, but ever ready to become prominent, stands the lord's right to escheats. This forms as it were a basis for all his other rights. The superiority which he always has over the land may at any time become once more a full ownership of it. Though he has given the land to the tenant and his heirs, still there may well be a failure of heirs, for the tenant cannot institute an heir. Only God makes heirs; and in this case the land falls to, escheats (*excadere*) to the lord. Already in Glanvill's day a lawyer may sometimes speak of the lord as the tenant's *ultimus heres*; but such a phrase hardly expresses the law.

When land escheats the lord's superiority swells into simple ownership; all along he has had rights in the land. Nor is a failure of heirs the only cause of an escheat. If the tenant is outlawed or convicted of felony, then, after the king has exercised the very ancient right of wasting the criminal's land for year and day, the tenement returns to its lord. A distinction is established between treason and felony; if a tenant commits treason all his lands, of whomsoever they were holden, are *forfeited* to the king, while the felon's lands *escheat* to his lord. How far back this distinction can be traced seems doubtful; but John and his successors apparently insisted upon it when they enriched themselves by seizing the *terrae Normannorum*, the English lands of those who preferred to be Frenchmen rather than Englishmen when the victories of Philip Augustus forced upon them the choice between two nationalities.

CHAPTER III.

THE DEFEUDALIZATION OF TENURES.

I POLL. & MAIT., HIST. ENG. LAW, 336. We are now in a position to foresee that of the four great free tenures one is destined to grow at the expense of the rest. For a moment it might be thought that the trenchant statute of 1290, the *Quia emptores terrarum*, would stereotype the tenures forever. To some extent this is true in law, but only to some extent. Even after the statute a new tenure might sometimes be created. Every feoffment made by a tenant in frankalmoin in favor of a layman would create a tenure between the donee and the donor's lord which could not be frankalmoin, since the donee was a layman, and which was reckoned a tenure in socage; thus in a perfectly regular way socage would grow at the expense of frankalmoin. We have seen also that in the course of the thirteenth century many of the serjeanties were deliberately commuted for less archaic tenures, in some cases by the consent of both parties, still more often against the tenant's will; he had put himself into the wrong by alienating without the king's license, and the king exercised the right of "arrenting the serjeanty." But we will here speak of changes less definitely made. When once it was established that the little serjeanties gave the king no prerogative wardship, "petty serjeanty" came to be regarded as but "socage in effect." A similar cause gave rise to the doctrine that tenure of a mesne lord is never tenure by serjeanty; the rights of a mesne lord to the wardship and marriage of his tenant by serjeanty seem to have become doubtful, and to have finally disappeared, and by this time the term *socage* already covered so heterogeneous a mass of tenures that it could be easily stretched yet a little farther so as to include what

Bracton would certainly have called serjeanties. Again, there can be little doubt that a very large number of military tenures became tenures in socage, and this without any one observing the change. In Bracton's day the test of military tenure is the liability to scutage, and, as already said, the peasant or yeoman very often had to pay it; if he had not to pay it, this was because his lord had consented to bear the burden. In Edward I.'s day scutage was becoming, under his grandson it became, obsolete. There was nothing then in actual fact to mark off the services of the yeoman who was liable to pay scutage as well as to pay rent, from those of the yeoman who was free even in law from this never collected tax. The one was theoretically a military tenant, the other was not; in the one case the lord might have claimed wardship and marriage, in the other he could not; but then we have to observe that, if the tenant held at a full or even substantial rent, wardship and marriage would be unprofitable rights. The lord wanted rent-paying tenants; he did not want land thrown on his hands together with a troop of girls and boys with claims for food and clothing. Thus, scutage being extinct, wardships and marriages unprofitable, mere oblivion would do the rest; many a tenure which had once been, at least in name, a military tenure would become socage. Thus socage begins to swallow up the other tenures, and preparation is already made for the day when all, or practically all, tenants will hold by the once humble tenure of the *sokemanni*.

2 BL. COM., 75-77. For the present I have only to observe that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honor, and their oaths to defend their king and country, the whole of this system of tenures now tended to noth-

ing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time, the families of all our nobility and gentry groaned under the intolerable burthens which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which, however, were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith¹ very feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still further, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this the untimely and expensive honor of *knight-hood*, to make his poverty more completely splendid. And when, by these deductions, his fortune was so shattered and ruined that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for *license of alienation*.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I. consented, in consideration of a proper equivalent, to abolish

¹ Commonw. l. 3, c. 3.

them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feudal grievance of heritable jurisdiction in Scotland, which has since been pursued and effected by the statute Geo. II., ch. 43. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the Crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the Crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterward made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued), were destroyed at one blow by the statute 12 Car. II. ch. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyhold, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself; since that only pruned the luxuriances that had grown out of the military tenures and thereby preserved them in vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches.

STAT. 12 CAR. II. (1660), c. 24. *An act taking away the Court of Wards and Liveries and Tenures in Capite, and by*

Knight-Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof.

Whereas it hath been found by former experience that the Court of Wards and Liveries and tenures by knight-service either of the king or others, or by knight-service *in capite*, or socage *in capite* of the king, and the consequents upon the same, have been much more burthensome, grievous and prejudicial to the kingdom than they have been beneficial to the king. And whereas since the intermission of the said court, which hath been from the four and twentieth day of February, which was in the year of our Lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight-service, whereupon divers questions might possibly arise unless some seasonable remedy be taken to prevent the same; Be it therefore enacted by the King our Sovereign Lord with the assent of the Lords and Commons in Parliament assembled, and by the authority of the same, and it is hereby enacted, That the Court of Wards and Liveries, and all wardships, liveries, primer seisins and *ousterlemains*, values and forfeitures of marriages, by reason of any tenure of the King's Majesty, or of any other by knight-service, and all mean rates, and all other gifts, grants, and charges, incident or arising for or by reason of wardships, liveries, primer seisins, or *ousterlemains* be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February, one thousand six hundred forty and five; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding. And that all fines for alienations, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising for or by reason of wardship, livery, primer seisin, or *ousterlemain*, or tenure by knight-service, escuage, and also *aide pur file marrier, et pur faire fitz chivalier*, and all other charges incident thereunto, be likewise taken away and discharged from the said twenty-fourth day of February, one thousand six hundred forty and five: any law, statute, cus-

tom, or usage to the contrary hereof in any wise notwithstanding. And that all tenures by knight-service of the king, or of any other person, and by knight-service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: and all tenures of any honors, manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politic or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February, one thousand six hundred forty and five, and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February, one thousand six hundred forty and five, and forever hereafter, turned into free and common socage; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

2. And that the same shall forever hereafter stand and be discharged of all tenure by homage, escuage, voyages royal, and charges for the same, wardships incident to tenure by knight's service, and values and forfeitures of marriage, and all other charges incident to tenure by knight-service, and of and from *aide pur file marrier*, and *aide pur faire fitz chivalier*; any law, statute, usage or custom to the contrary in any wise notwithstanding. And that all conveyances and devises of any manors, lands, tenements, and hereditaments, made since the said twenty-fourth day of February, shall be expounded to be of such effect as if the same manors, lands, tenements, and hereditaments had been then held and continued to be holden in free and common socage only; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

* * * * *

4. And be it further enacted by the authority aforesaid, That all tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight-service, or *in capite*, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, *ousterlemain*, *aide pur faire fitz chivalier* and *pur file marrier*; any law, statute or reservation to the contrary thereof in any wise notwithstanding.

5. Provided nevertheless, and be it enacted, That this act, or anything herein contained, shall not take away, nor be construed to take away, any rents certain, heriots, or suits of court, belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident or belonging to tenure in common socage due or to grow due to the King's Majesty, or mean lords, or other private person, or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common socage.

6. Provided always, and be it enacted, That anything herein contained shall not take away, nor be construed to take away any fines for alienation due by particular customs of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*.

7. Provided also, and be it further enacted, That this Act, or anything herein contained, shall not take away, or be construed to take away, tenures in frank-almoign, or to subject them to any greater or other services than they now are; nor to alter or change any tenure by copy of court-roll, or any services incident thereunto; nor to take away the honorary services of grand serjeanty, other than of wardship, marriage, and value of forfeiture of marriage, escuage, voy-

ages royal, and other charges incident to tenure by knight-service; and other than *aide pur faire fitz chivalier*, and *aide pur file marrier*.

Co. Lit., 85, a. By the 12 Cha. 2, ch. 24, tenure by knight's service, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of socage *in capite*, is wholly taken away; and every such tenure is converted into free and common socage. The same statute enacts, that all tenures which should afterward be created by the king, should be in free and common socage only. Nothing can be more full in expression than this act; for besides generally abolishing tenure by knight's service, and the consequences peculiar to that tenure and socage *in capite*, it descends into particulars with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legislature had under contemplation, for which purpose it might be deemed most safe to attack them in every shape. We have already observed in some former notes, that homage, escuage, and the aids *pur file marrier* and *pur faire fitz chivalier* are expressly mentioned. It remains to add, that the statute, after taking away the court of wards and liveries, enumerates wardships, liveries, primer seisins or ousterlemains, values and forfeitures of marriages, and fines, seizures, and pardons for alienation, and sweeps away the whole. But the act preserves rents certain, heriots, suits of court, and other services incident to common socage and fealty; and also fines for alienation due by the customs of particular manors, unless such fines are for lands *in capite*. Reliefs for lands, of which the tenure is converted into common socage, are also saved in some instances; for the clause which preserves rents certain provides that such relief shall be paid in respect of such rents, as is paid on the death of a tenant in common socage. From this clause it seems, that there can be no relief out of lands which the statute changed into socage, unless where a quit rent is also payable; and the

reason of thus expressing the act will appear by considering that a year's rent is the relief for lands holden by common socage, and consequently is never due out of lands which are not subject to a rent, unless by special custom, or express reservation.—*Hargrave's note*, 55.

Co. Lit., 93, *b*. It may be proper to conclude this Chapter of Socage by pointing out the several changes made in the tenure of socage by the statute of the 12 Cha. 2, ch. 24, so often mentioned. 1. It takes away the aids *pur file marrier* and *pur faire fits chivalier*, which were incident to all socage-tenures. 2. It relieves socage *in capite* from the burden of the king's *primer seisin* and of *fines of alienation to the king*; to both of which *socage in capite* was equally liable with tenure by *knight's service in capite*, though not so to wardship. 3. It extends the father's power of appointing guardians by deed or will, which by the 4 and 5 Phil. and Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage. In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the restoration. But the statute of Charles II. goes further than the mere alteration of socage; and having thus reformed and improved this favorite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service and by taking from the Crown the power of creating any other tenure than socage in future.—*Hargrave's note*, 95.

REAL PROP. COMRS., THIRD REP. (1833), 7. But though the ancient doctrine, that all land is held of a superior lord, ought in our opinion to remain, we consider the variety of tenures still subsisting an unqualified evil; and we think that everything should be done which is consistent with the

rights of property, to reduce them all to one simple tenure, stripped of all local customs, and attended by the same rules, as to enjoyment and transmission. The tenures now subsisting are :

1. Frankalmoign, and by Divine Service.
2. Grand Serjeanty, as far as honble. services are concerned.
3. Free and Common Socage.
4. Socage, subject to the custom of Borough English.
5. Socage, subject to the custom of Gavel-kind.
6. Ancient Demesne.
7. Copyhold.
8. Customary Freehold.

Free and common socage is fortunately the tenure by which the great bulk of real property in England is now held. In the time of Lord Coke copyhold tenure was much more common than at present, and the land that was not of base tenure was principally held in chivalry. To the enfranchisement of copyholds and the abolition of military tenures may, we conceive, be ascribed some portion of the agricultural improvement and increase of public wealth which have since taken place; and we consider it a matter of great importance that all lay fees should be held by free and common socage.

This tenure has all the advantages of allodial ownership. The *dominium utile* vested in the tenant comprises the sole and undivided interest in the soil. Escheat is the only material incident of this tenure beneficial to the lord; and, while there is an heir or devisee, he can in no way interfere.

The tenant in fee simple of socage land can of his own authority create in it any estates and interests not contrary to the general rules of law; he can alien it entirely or devise it to whom he pleases, and the alienee or devisee takes directly from him, so that the title is complete without the concurrence or privity of the lord.

WILLIAMS, REAL PROP. (17TH ED.), 60-63. Since the

year 1645, therefore, the only free tenures existing have been the lay tenure of free and common socage and the spiritual tenure of frankalmoign. In modern times the incidents which mark the relation of lord and tenant of an estate in fee simple held in socage are of rare occurrence. Thus a *rent* is not now often paid in respect of the tenure of an estate in fee simple. When it is paid, it is usually called *quit rent*, and is almost always of a very trifling amount; the change in the value of money in modern times will account for this. The *relief* of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is accordingly still due. Suit of Court also is still obligatory on tenants of estates in fee simple, held of any manor now existing. And the oath of fealty still continues an incident of tenure; but in practice it is never exacted. There is, however, one incident of tenure still remaining, which is occasionally productive of substantial advantage to the lord. The lands of a tenant in fee simple remain liable to escheat to the lord of the fee on failure of the tenant's heirs. At the present day failure of heirs can only occur from natural causes, for an act of the year 1870 abolished all attainder, forfeiture or escheat upon judgment for treason or felony.¹ When, therefore, a tenant in fee simple dies, without having alienated his lands in his lifetime or by his will (either of which will prevent escheat), and without leaving any blood relation to succeed him as his heir, such lands will fall in to the lord of whom they were held. Bastardy is the most usual cause of the failure of heirs; for a bastard is in law *nullius filius*; and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir of his body. If such a person, therefore, were to purchase lands, that is, to acquire an estate in fee simple in them, and were to die possessed of them without having made a will and without leaving any issue, the lands would escheat to the lord of the fee, for

¹ Stat. 33 & 34 Vict., c. 23, s. 1.

want of heirs. When an escheat occurs, the Crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the Crown is the lord paramount of all the lands in the kingdom. But if there should be any lord of a manor, or other person, who could prove that the estate so terminated was held of him, he, and not the Crown, would be entitled. In former times there were many such mesne or intermediate lords, as we have seen. But now the fruits and incidents of tenure of estates in fee simple are so few and rare that many such estates are considered as held directly of the Crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact before mentioned, that, since the statute of *Quia Emptores*, passed in the reign of Edward I., it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seigniorship of an estate in fee simple bears date at least as far back as that reign; to this rule the few seigniorships which may have been subsequently created by the king's tenants *in capite* form the only exception.

A small occasional *quit rent* with its accompanying *relief*—*suit* of the *Court Baron*, if any such exists—an oath of *fealty* never exacted—and a right of *escheat* seldom accruing—are now, it appears, therefore, the ordinary incidents of modern socage tenure. There are, however, a few varieties in this tenure which are worth mentioning. They arise in respect either of the terms on which the lands holden were originally granted, or the places where they are situate. As to the former case lands may still be holden by grand or petit serjeanty; for while by the Act of Charles II. grand serjeanty was, with the other military tenures, turned into socage and deprived of its burdensome incidents, its honorary services were expressly retained. And petit serjeanty, being but socage in effect, was not abolished by the statute.

CHAPTER IV.

COPYHOLD TENURE.

BRACTON, 36. Further a man may grant a tenement which he himself held by military service to be held in villenage by villein customs and services, provided that they are fixed and defined.

Id., 208. Further there is a species of tenement called a villein tenement: and the tenure of villein tenements is sometimes pure villenage, sometimes privileged villenage. Pure villenage is where land is held on such terms that the tenant in villenage, whether he be free or a serf, shall do for his villein tenement whatever be commanded him, and has no right to know at night what he will have to do on the morrow; and he shall always be bound to uncertain services. Further he is liable to be taxed at the will of the lord to any extent. Further he is bound to pay a fine for the privilege of giving his daughter in marriage, and thus he will always be bound without defined limits, provided that, if he be a free man, he performs these duties as an incident of his tenure, not of personal status; and he will not by right be bound to pay the fine on marriage of a daughter, for this is appropriate to the personal status of a villein, not of a free man. But if he be a villein, he is bound to do all things, however undefined, both as an incident of his holding as a villein and of his personal status, nor can a free man, if he hold in this way, retain the villein tenement against the will of the lord, nor can he himself be compelled to retain it unless he desires to do so. There is also a holding in villenage not of such a pure type, whether the grant be to a free man or to a villein, by means of a covenant to be held for fixed services and customs named and expressed in the deed,

although the services and customs are of villein nature. And if a free man or a villein who has received his freedom, or who has been conveyed to another person, is ejected from such a holding, they cannot recover the land as a free tenement because it is a villein tenement, and the assize would not lie. The assize may, however, be converted into a jury to inquire concerning the covenant, because of the intent and assent of the transferrer: for if the complainants in such a case recover the villein tenement, there will not on this account be any wrong done to the lord because of his intent and assent, and the law does not come to the aid of the tenant contrary to the will of the lord; since if the lord is able to free the villein and to grant him a freehold, much rather can he make a covenant with him, for if the lord can do that which is more important, all the more can he do that which is less important.

There is also another kind of villein tenure which has been held of our lord the king ever since the Conquest of England. This is called villein socage, and it is a villein tenure, but of a privileged kind. Thus the tenants of the demesne of our lord the king have this privilege, that they cannot be removed from the land as long as they are willing and able to render the services which they owe, and villein socmen of this kind are properly said to be bound to the land. Moreover they render villein services, but the services are fixed and ascertained. Nor can they be compelled contrary to their desire to hold tenements of this kind, and therefore they are called free. Further they cannot make a gift of their tenements, or transfer them to others by the title of gift any more than pure villeins can, and therefore if the tenements have to be transferred, the tenant surrenders them to the lord or his bailiff, and the lord transfers them to other persons to be held in villenage.

LIT., § 73. Tenant by copy of court-roll is, as if a man be seised of a mannor, within which mannor there is a custome, which hath beene used time out of minde of man,

that certaine tenants within the same mannor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c., at the will of the lord according to the custome of the same manor.

§ 74. And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c., into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

A. of *B.* commeth into this court, and surrendreth in the same court a mease, &c., into the hands of the lord, to the use of *C.* of *D.* and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid *C.* of *D.* and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services and customes thereof before due and accustomed, &c., and giveth the lord for a fine, &c., and maketh unto the lord his fealty, &c.

§ 75. And these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

§ 76. And such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's court in this forme, or to this effect: *A.* of *B.* complains against *C.* of *D.* of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c., with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordancester at the common law, or of an assise of novel disseisin, or formedon in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute *F. G.*, &c.

§ 77. And although that some such tenants have an inheritance according to the custome of the manor, yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases.

But *Brian*, chiefe justice, said, that his opinion hath alwaies been, and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have an action of trespass against him. *H. 21, Ed. 4.* And so was the opinion of *Danby*, chiefe justice, in *7 Ed. 4.* For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law.

DIGBY, HIST. REAL PROP., Ch. V. § 6. *Copyhold Tenure.*—It has been already seen that, at the time of Domesday, besides the *liberi homines* there was commonly a large class of persons of an inferior status, residing within the limits of the manor and bound as a general rule to render services upon the domain lands of the lord. The various names which prevailed at the time of Domesday and earlier cease to be recognized, and we hear only of *villani*, villeins. [These were either villeins *regardant*—that is, attached to the land, in which case the right to the services of the villein passed with every alienation of the land; or villeins *in gross*, attached to the person of the lord, the right to their services being saleable by deed. It is with the former class that the history of the law of land is mainly concerned.]

When a villein was attached to a particular manor, it followed as a matter of course that he had a permanent habitation, and the means of supporting himself and his family by the occupation of a plot of ground. This must have been the

practice long before the Conquest, and was continued when the customary law of land was modified by the changes wrought by the Norman rule. When the judicial institutions of the country took the form in which they appear in the reign of Henry II., there was no *forum* in which the villein could assert his right to his land, at all events as against the lord. The courts baron of the manors were only for the freeholders of the manor, and the Curia Regis was in one point of view but the supreme court baron of the nation, and only took cognizance of freehold rights. The villein had no *locus standi* in either. At the same time, . . . it became the practice to regard not so much the status of the villein, as the nature of his interest in land arising from the character of the services rendered to the lord, and thus freemen came to hold land "in villenage," and were little or no better off as to legal rights than the born villeins. The only legal protection, which either the villein or the freeman holding in villenage seems to have had against the lord in Bracton's time, was where the lord entered into a covenant with the tenant in villenage.

The lawyers described the position of the tenant in villenage by the expression that he held his land at the will of the lord. But, as a matter of fact, the customs and practices which prevailed in the various manors tended to protect and perpetuate the interests of this class of tenants. Custom fixed the rights of the lord, the amount of service to be rendered to him, the heriots upon the death of the tenant, the fine on the admittance of a new tenant, the mode of succession and devolution of the lands to the tenant's eldest or youngest son or to all the sons alike, and so forth. These customs, though the institutions of the country afforded no means of enforcing them as against the lord by judicial action, were deeply rooted in the habits of the people, and in all probability the lord who ventured to set them aside and deprive the villein of his customary rights must have been exceptionally grasping and defiant of public opinion. Thus it is that throughout the period extending from Brac-

ton to Edward IV. we hear this class of tenants spoken of as if they had a recognized and legally protected interest in lands. Sir E. Coke¹ points out that "in H. V. 11 they be called copiholders, in 14 H. IV. 34 tenant *per le verge*, and in 42 E. III. 25 tenant *per role solonque le volunt le seignior*, and in statute of 4 E. I., called Extenta Manerii, they are called *custumarii tenentes*."

It appears that the tenants in villenage were present at manorial courts, not on a level with the freeholders or free suitors to the court,—who were the *pares curiae*, the judges of the court, by whose equal voice all matters were decided,—but in an inferior position. The customary heir would appear at the court and humbly request admittance to the land of his deceased father on payment of the customary dues; the tenant who had sold his holding in villenage would appear and surrender his land to the lord or his steward, and the purchaser would request admittance. These and similar transactions are recorded on the rolls of the court. The rolls of the court therefore contain the evidence of the customs of the manor, the authorized copy of the entry on the rolls of the court delivered to the tenant is his muniment of title, and gives him his name of "copyholder."

Thus in dealing with this class of tenants the court baron assumed a new form, which comes to be distinguished from the original court baron, and to be called the Customary Court Baron or Customary Court. The freeholders are not, generally speaking, suitors at the Customary Court, except perhaps when questions arise upon the customs of the manors affecting their interests. The functions of the court are administrative rather than judicial. The copyholders or "homage" are not *pares curiae*. Their principal function is to make presentments upon matters concerning their interests and the customs of the manor. Their powers vary according to the customs of different manors. In some there is a custom for the lord to enclose, or to grant portions of the waste to hold as copyhold, with the assent of the homage,

¹Co. Lit. 58, a.

which is usually expressed by a sworn jury of copyholders. The lord, or more commonly the steward, presides over the court; it is his duty to receive and record the presentments of the homage.

Gradually the interest of the copyholder came to be recognized by the regular tribunals. The great step seems to have been the recognition of the right of the tenant in villenage to maintain an action of trespass against his lord. Thus incidentally and gradually the courts of common law came to recognize and enforce the customs which had grown up in different manors; for example, the custom of allowing the eldest son to succeed his father in his holding, or of admitting as tenant the person to whom the previous holder had sold his rights. As the character of the rights depended upon the customs proved to prevail in the different manors, the rights of copyholders varied accordingly. We find various customs as to the rules of descent, duration of interest, modes of alienation, extent of power of user and otherwise, prevailing in different manors, the customs of each manor constituting the law prevailing therein. Except where altered by special custom, copyholds, as to duration of interest, time of enjoyment, mode of descent, joint tenancy and tenancy in common, in general resemble freehold interests.

Copyhold tenure presents in the main the same characteristics at the present day. Land held by copyhold tenure is always parcel of, and included in, a manor. The lord of the manor has the freehold, the copyholder holds "at the will of the lord according to the custom of the manor." The evidence of the nature and extent of his rights is to be looked for, primarily, in the court rolls of the manor: To these reference is made for ascertaining the various dues (fines, heriots, quit rents,¹ and the like) which the copyholder must render to the lord. Here also is found the evidence of the mode of descent, mode of alienation, rights of the surviving husband or widow of the tenant, rights of the copyholder to

¹ "*Quieti reditus*, because thereby the tenant goes quit and free of all other services." Blackstone, ii. 42.

common on the wastes of the manor, and so forth. For the lord being the freeholder, his rights of ownership remain untouched, except so far as they are limited by the copyholder's rights which have supervened. But inasmuch as the most important of the rights of ownership, the right of exclusion, is vested in the copyholder, a curious conflict sometimes arises. In some manors the copyholder may not cut timber or open mines, for these are rights belonging to the lord; but the lord cannot come upon the land to exercise them.

The copyholder has the free right of alienation, but the mode of alienation preserves curiously the history of the interest. The copyholder first surrenders the land to the lord, and the lord then admits (and may be compelled to admit) the nominee of the copyholder upon payment of the accustomed fine, if any. . . .

The change in the position of the copyholder is thus summed up by Sir Edward Coke¹: "For, as I conjecture, in the Saxons' time, sure I am in the Norman's time, these copyholders were so far subject to the lord's will, that the lords upon the least occasion (sometimes without any color of reason, only upon discontentment and malice, sometimes again upon some sudden fantastick humour, only to make evident to the world the height of their power and authority), would expel out of house and home their poor copyholders, leaving them helpless and remediless by any course of law, and driving them to sue by way of petition. But now copyholders stand upon a sure ground; now they weigh not their lord's displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely; only having a special care of the main chance, to perform carefully what duties and services soever their tenure doth exact, and custom doth require: then let lord frown, the copyholder cares not, knowing himself safe, and not within any danger. For if the lord's anger grow to expulsion, the law hath provided several weapons of remedy; for it is at

¹Compleat Copyholder, secs. 8, 9.

his election either to sue a *subpoena*,¹ or an action of trespass against the lord. Time has dealt very favorably with copyholders in divers respects."

It might have been expected that so anomalous a class of rights as that which constitutes copyhold tenure would before the present time have been assimilated to the other forms of property in land. This, however, has not been done. Copyholds might at any period have been enfranchised (or converted into freeholds) by the conveyance of the freehold by the lord to the copyholder, or extinguished by surrender of the copyhold by the tenant to the lord. Various acts have in recent times created facilities for this process by providing means for the assessment and commutation of the lord's rights and otherwise; and at the present day either lord or copyholder may compel enfranchisement by taking the proper steps through the action of the Board of Agriculture.

Where copyholds have not been enfranchised (and there is still a large though gradually decreasing amount of land subject to copyhold tenure) the rights are still regulated entirely by custom. And inasmuch as the characteristics of this form of property depend entirely upon custom, they must have prevailed from a time whereof the memory of man runneth not to the contrary. In practice this means that the customary usages should be shown to have existed as far back as available evidence goes, from which the legal inference arises that they have existed from time immemorial—that is, ever since the first year of Richard I.²

¹ The technical expression for proceedings in Chancery, see page 151, *post*.

² This date seems to have become fixed as giving a definite meaning to the expression "time whereof the memory of man runneth not to the contrary," in consequence of its having been fixed by the Statute of Westminster I. (3 Edw. I., c. 39) as the period of limitation in the case of a writ of right.

III. *Tenure in the United States.*

I STORY CONST., § 172. In all the colonies the lands within their limits were by the very terms of their original grants and charters to be holden of the Crown in free and common socage, and not *in capite*, or by knight's service. They were all holden either as of the manor of East Greenwich in Kent, or of the manor of Hampton Court in Middlesex, or of the castle of Windsor in Berkshire. All the slavish and military part of the ancient feudal tenures was thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens which for a long time affected the parent country, and were not abolished until after the restoration of Charles the Second. Our tenures thus acquired a universal simplicity; and it is believed that none but freehold tenures in socage ever were in use among us. No traces are to be found of copyhold or gavel-kind or burgage tenures. In short, for most purposes, our lands may be deemed to be perfectly allodial, or held of no superior at all, though many of the distinctions of the feudal law have necessarily insinuated themselves into the modes of acquiring, transferring and transmitting real estates. One of the most remarkable circumstances in our colonial history is the almost total absence of leasehold estates. The erection of manors, with all their attendant privileges, was, indeed, provided for in several of the charters. But it was so little congenial with the feelings, the wants, or the interests of the people, that after their erection they gradually fell into desuetude; and the few remaining in our day are but shadows of the past, the relics of faded grandeur in the last steps of decay, enjoying no privileges, and conferring no power.

3 KENT COM., 509-514. Most of the feudal incidents and consequences of socage tenure were expressly abolished in New York, by the act of 1787; and they were wholly and entirely annihilated by the *New York Revised Statutes*, as has been already mentioned. They were also abolished by statute in Connecticut in 1793; and they have never existed, or they have ceased to exist, in all essential respects, in every other State. The only feudal fictions and services which can be presumed to be retained in any part of the United States consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due. The act of New York, in 1787, provided that the socage lands were not to be deemed discharged of "any rents certain, or other services incident, or belonging to tenure in common socage, due to the people of this State, or any mean lord, or other person, or the fealty or distresses incident thereunto." The *Revised Statutes* also provide, that "the abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may be, created or reserved." The lord paramount of all socage land was none other than the people of the State, and to them, and them only, the duty of fealty was to be rendered; and the quit-rents which were due to the king on all colonial grants, and to which the people succeeded at the Revolution, have been gradually diminished by commutation, under various acts of the legislature, and are now nearly, if not entirely extinguished.

In our endeavors to discover the marks or incidents which with us discriminated socage tenure from allodial property, we are confined to the doctrine of fealty, and of holding of a superior lord. Fealty was regarded by the ancient law as the very essence and foundation of the feudal association. It could not on any account be dispensed with, remitted, or discharged, because it was the *vinculum commune*, the bond or cement of the whole feudal policy. Fealty was the same as *fidelitas*. It was an oath of fidelity to the lord, and to

use the words of Littleton, when a freeholder doth fealty to his lord, he shall lay his right hand upon a book, and shall say, "Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the terms assigned; so help me God and his saints." This oath of fealty everywhere followed the progress of the feudal system, and created all those interesting ties and obligations between the lord and his vassal, which, in the simplicity of the feudal ages, they considered to be their truest interest and greatest glory. It was also the parent of the oath of allegiance, which is exacted by sovereigns in modern times. The continental jurist frequently considered homage and fealty as synonymous; but this was not so in the English law, and the incident of homage was expressly abolished in New York by the act of 1787, while the incident of fealty was expressly retained. Homage, according to Littleton, was the most honorable and the most humble service of reverence that a frank-tenant could make to his lord; but it is quite too abject and servile a ceremony of submission, allegiance and reverence, to be admissible at this day. . . .

The New York Statute of 1787 saved the services incident to tenure in common socage, and which it presumed might be due not only to the people of the State, but to any mean lord, or other private person, and it saved the fealty and distresses incident thereunto. But this doctrine of the feudal fealty was never practically applied, nor assumed to apply to any other superior than the chief lord of the fee, or in other words, the people of the State, and then it resolved itself into the oath of allegiance which every citizen, on a proper occasion, may be required to take. . . .

Under the New York Statute, 1787, fealty, in the technical sense of the feudal law, was a dormant and exploded incident of feudal tenure; and by the Revised Statutes, even the fiction has become annihilated, unless it may be supposed to be lurking in the general declaration, that "the

people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State."

Thus, by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen. Though the doctrine of a feudal tenure by free and common socage may be applicable to the real property in this country, chartered and possessed before our Revolution, and though every proprietor should be considered as holding an estate in fee-simple, none of the inconveniences of tenure are felt or known. We have very generally abolished the right of primogeniture, and preference of males, in the title by descent, as well as the feudal services, and the practice of subinfeudation, and all restraints on alienation. Socage tenures do not exist any longer in some of the United States, while they still exist, in theory at least, in others; but where they do exist they partake of the essential qualities of allodial estates. An estate in fee-simple means an estate of inheritance, and nothing more, and in common acceptation it has lost entirely its original meaning as a beneficiary or usufructuary estate, in contradistinction to that which is allodial. It was used even by Littleton and Coke, to denote simply an inheritance; and they are followed by Sir Martin Wright and Sir William Blackstone. Whether a person holds his land in pure *allodium*, or has an absolute estate of inheritance in fee-simple, is perfectly immaterial, for his title is the same to every essential purpose.

4 Id., 3. It was undoubtedly proper that the tenure of lands should be uniform, and that estates should not in one part of the country be of the denomination of socage tenures, and in another part allodial; but it may be doubted, whether there was any wisdom or expediency in the original statute provision, declaring lands in New York to be allodial, and abolishing the tenure of free and common socage, since

nothing is gained in effect, and nothing is gained even in legal language, by the alteration. The people of the State, in their right of sovereignty, are still declared to possess the original and ultimate property in and to all lands; and the right of escheat, and the rents and services already in use, though incident to the tenure of free and common socage, are reserved.

2 BL. COM., 78. In those States in which, by express legislative enactment, lands have not been declared allodial, while tenure exists, it is only in theory. All lands are supposed to be held mediately or immediately of the State, which has succeeded by the Revolution to the feudal position of paramount lord before that period occupied by the Crown. Escheat in most of the States is regulated by statute. In *Cornell v. Lamb*, 2 Cowen, 652, it was declared by Woodworth, J., that fealty was not in fact due on any tenure in the State of New York, and had become altogether fictitious. In Pennsylvania, it has been decided that the statute of *Quia emptores* was never in force, and subinfeudation was always lawful; and though there are some opinions that tenures fell with the Revolution, yet all agree that they existed before, and the better opinion appears to be that they still exist. The principles of the feudal system, in truth, underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognized recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitation in deeds—the distinction between words of limitation and words of purchase—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of a particular estate or *eo instanti* that it determines, that the heir cannot take as a purchaser an estate the freehold of which by the same deed is vested in the ancestor—and many more rules and principles of very great practical importance, and meeting us at every turn in the American as well as the English law of real estate—are all

referrible to a feudal origin. "The principles of the feudal system," said Chief Justice Tilghman, "are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture." *Lyle v. Richards*, 9 S. & R., 333. "Though our property is allodial," said Chief Justice Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." *McCall v. Neely*, 3 Watts, 71.—*Sharswood's note*.

I GRAY, CAS. PROP., 407, *note*. *Tenure in the United States*.—Land in the colony of Virginia was holden of the king as of the "manor of East Greenwich, in the county of Kent, in free and common socage only, and not *in capite*." Lucas, Chart. 8, 12, 22; so in Massachusetts, *id.* 36, 75; so in Connecticut, *id.* 54; so in Rhode Island, *id.* 65. Land in Maryland was holden of the king as of the castle of Windsor, in the county of Berks, "in free and common socage, by fealty only, for all services, and not *in capite*, or by knight's service"; yielding annually "two Indian arrows of those parts." *Id.* 90. And the proprietary could grant land to be held of himself, the statute of *Quia emptores* notwithstanding. *Id.* 95. So in Pennsylvania, yielding "two beaver skins." *Id.* 101, 106. Land in Georgia was to be held of the king as of the manor of Hampton Court, in the county of Middlesex, in free and common socage, and not *in capite*, at a money rent. *Id.* 117.

NEW YORK CONST., 1894, Art. I., § 10. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people.

§ 11. All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, how-

ever, all rents and services certain which at any time heretofore have been lawfully created or reserved.

§ 12. All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

§ 13. No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

§ 14. All fines, quarter-sales or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

19 N. Y. REP., 73. Our ancestors in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation (1 Kent, 473, and cases cited in note *a* to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178); and when the first constitution of this State came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this State, subject, of course, to alteration by the legislature. (Art. 35.) The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the king was not within the statute *Quia emptores* a certain tenure, which after the act of 12 Charles II., ch. 24, abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have

elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I. (*The People v. Van Rensselaer*, 5 Seld. 334.) But with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his Treatise upon Tenures.—*Per Denio, J.*, in *Van Rensselaer v. Hays* (1859).

GRAY, PERPETUITIES, § 24. In those States where tenure no longer obtains, there can be no question whether the statute *Quia emptores* is in force; its subject-matter has ceased to exist. In this condition are at least Connecticut, New York, Maryland, Virginia, Ohio, Wisconsin, West Virginia, Kentucky (?), Minnesota, California.

§ 25. In the States where there is no reason to question the existence of tenure, there seems as little reason to question the existence of the statute *Quia emptores*. There is no cause why this statute should not have prevailed as generally as the statute *De Donis*. *Denio, J.*, in *Van Rensselaer v.*

Hays, points out the absurdity of supposing that subinfeudation existed in the Colonies generally. In New Jersey the statute was in force, and has been expressly re-enacted; Mr. Dane says that the statute of *Quia emptores* was "never adopted here" (*qu.* in Massachusetts). But no authority is cited for the proposition. The alleged non-existence of the statute in North Carolina, Tennessee, Georgia, Alabama, and Mississippi rests upon the same ground as the alleged non-existence in those States of the statute *De Donis*, which, as we have seen, wholly fails. In Indiana, Illinois, and Michigan either there is no tenure, or if tenure exists, the statute *Quia emptores* exists also. There would seem to be, of the States in which tenure exists at the present day, but two in which the statute *Quia emptores* is not in force—Pennsylvania and South Carolina.

§ 26. *Pennsylvania*.—By the charter of 1681 the Crown granted to William Penn the power to grant land to be held of himself, his heirs and assigns, and not immediately of the Crown, the statute *Quia emptores* notwithstanding. And in *Ingersoll v. Sergeant* (1836), a very elaborately argued and carefully considered case, it was held that the statute *Quia emptores* was not in force, and that therefore rent reserved on a conveyance in fee-simple was rent service and could be apportioned. This decision has always been deemed a landmark in the law of Pennsylvania; but in *Wallace v. Harmstad* (1863) the court ruled that there was no tenure in the State. This ruling was unnecessary to the decision of the case, and has been far from meeting with universal acceptance. It has been severely criticised by Chief Justice Sharswood in his Law Lectures, and by Mr. Cadwalader in his treatise on Ground Rents. These criticisms seem just. If *Wallace v. Harmstad* had professed to overrule *Ingersoll v. Sergeant*, the ruling, whether right or wrong, would be plain enough. But on the contrary it is said: "That ground rent is a rent service was fundamental in *Ingersoll v. Sergeant*, a case which has been so often recognized and followed as to have become a rule of property."

In fact, *Wallace v. Harmstad* is unintelligible. To speak of rent service, or of the statute *Quia emptores*, in a State where tenure is non-existent, is an absurdity; rent service and the statute *Quia emptores* necessarily imply tenure. They are meaningless terms without it. Considering the high authority which has always attached to *Ingersoll v. Sergeant*, there may be reason, in spite of *Wallace v. Harmstad*, to believe that tenure still exists in Pennsylvania, and that the statute *Quia emptores* does not.

§ 27. *South Carolina*.—On December 12, 1712, was passed an act to put in force in the province the English statutes therein particularly mentioned, the tenth section of which declared that all the English statutes not enumerated and made of force in the province by the act were impracticable in the province. The statute *Quia emptores* is not mentioned in this act, and is therefore not law in South Carolina.

§ 28. The important result of this inquiry, for our present purposes, is that in all of the United States, with the exception of South Carolina and perhaps Pennsylvania, land, if held at all, can be held of none but the State; for in all the States, with the two exceptions, either there is no tenure, or, if there is tenure, the statute *Quia emptores* is in force.

B. EQUITABLE OWNERSHIP.

CHAPTER I.

USES.

(a) *Before the Statute.*

1 CO. REP., 121. An use is a trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land, *scil.* that *cestui que use* shall take the profits, and that the tertenant shall make estates according to his direction. So that he who hath an use hath not *jus neque in re, neque ad rem*, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons for the breach of the confidence were to be imprisoned till they did perform it; and therefore the case of an use is not like unto commons, rents, conditions, etc., which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the tertenant, or by disseisins, or by escheats, etc., as uses may, as shall after be said. There were two inventors of uses, fear and fraud; fear in times of troubles and civil wars to save their inheritances from being forfeited; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc.—*Chudleigh's Case*.

CO. LIT., 271, b. Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery, &c., or out of the state of the owner of the land, by bargain and sale by deed indented and inrolled, or by covenant upon lawfull consideration, whereof you may read plentifully in my *Reports*.

272, a. The greater part of the lands in England in those troublesome and dangerous times (when that unhappie controversie betweene the houses of York and Lancaster was begun) were in use.

BACON, USES, TRACTS, 303. First, use is no right, title, or interest in law, and therefore master attorney who read upon this statute said well, that there are but two rights—*Jus in re*, *Jus ad rem*. The one is an estate, which is *Jus in re*, the other a demand, which is *Jus ad rem*, but a use is neither. . . . The books go farther and say that a use is nothing, as in 2 H. VII. . . . But these books are not to be taken generally or grossly, for we see in the same books, when an use is specially alleged, the law taketh knowledge of it; but the sense of it is, that use is nothing for which remedy is given by the course of the common law, so as the law knoweth it, but protects it not; and therefore when the question cometh whether it hath any being in nature and conscience the law accepteth of it; and therefore *Littleton's* case is good law, that he which hath but forty shillings freehold in use, shall be sworn in an inquest, for it is ruled *secundum dominium naturale* and not *secundum dominium legitimum*, *nam natura dominus est, quia fructum ex re percipit*.

Id., 314. For the inception and progression of uses, I have for a precedent in them searched other laws, because states and commonwealths have common accidents; and I find in the civil law, that that which cometh nearest in name to the use, is nothing like in matter, which is *usus fructus*; for *usus fructus* and *dominium* is with them, as with their particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*, and therefore you shall find in *Justinian, lib. 2*, that they had a form in testaments, to give inheritance to one to the use of another, *Haeredem constituo Caium, rogo autem te, Caie, ut haereditatem restituas Seio*; and the text of the civilians saith, that for a great time if the heir did not, as he was required,

cesty que use had no remedy at all, until about the time of *Augustus Caesar* there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti*, or *per fortunam Augusti*, &c. Whereupon *Augustus* took the breach of trust to sound in derogation of himself, and made a rescript to the *praetor* to give remedy in such cases; whereupon within the space of a hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *praetor fidei commissarius*; and not long after the inconvenience of them being found, they resorted unto a remedy much like unto this statute; for by two decrees of senate, called *senatus consultum Trebellianum* and *Pegasianum*, they made *cesty que use* to be heir in substance. I have sought likewise, whether there be anything which maketh with them in our law, and I find that *Periam*, chief baron, in the argument of *Chudley's* case, compareth them to copyholders, and aptly for many respects. . . .

Now, for the cases whereupon uses were put in practice, *Coke* in his reading doth say well, that they were produced sometimes for fear, and many times for fraud. But I hold that neither of these cases were so much the reasons of uses, as another reason in the beginning, which was, that lands by the common law of *England* were not testamentary, or devisable; and of late years since the statute, the case of the conveyance for sparing of purchases, and execution of estates; and now last of all an excess of evil in men's minds, affecting to have the assurance of their estate, and possession to be revocable in their own times, and irrevocable after their own times. . . .

I cannot find in any evidence before King R. II. his time, the clause *ad opus and usum*, and the very Latin of it savoureth of that time; for in ancient time, about Edw. I. his time, and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see by *Bracton's* writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin; wherein this phrase

(*ad opus and usum*) and the words (*ad opus*) is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus* and *usus* coupled together, and that they did govern an ablative case; as they do indeed since this statute, for they take away land and put them into a conveyance.

2 POLL. & MAIT., HIST. ENG. LAW, 226. The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the "use, trust, or confidence." In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*; nevertheless the earliest history of "the use" is the early history of the phrase *ad opus*.

Id., 229. Now in few, if any, of these cases can the *ad opus* be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the "feoffee to uses" (we can employ no other term to describe him) shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly the citizens of London would have known what an interdict meant, had they misappropriated the lands conveyed to them for the use of the friars, those darlings of popes and kings. Again, in some cases the feoffment might perhaps be regarded as a "gift upon con-

dition," and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form "the use" had not become common enough to find a comfortable niche in the fabric. And so for a while it lives a precarious life until it obtains protection in the "equitable" jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between "real" and "personal" rights, they might have reduced "the use" to submission and assigned to it a place in their scheme of actions: in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him not money compensation, but enjoyment of the land. "The use" seems to be accomplishing its manifest destiny when at length, after many adventures, it appears as "equitable ownership."

DIGBY, HIST. REAL PROP., Ch. VI. It is not easy to discover at what time the practice first arose of attaching to the alienation of land a trust or confidence that the alienee should hold the lands to the *use* of the donor, or of some third person named by him. When "uses" are first noticed in the records of our law they appear as the result of established and well-known practice. Yet it was long before the obligation of a "use, trust, or confidence" was recognized by any tribunal. It is true that the ecclesiastical courts at one time enforced conscientious obligations, entertaining suits *de fidei laesione*, but this jurisdiction is said to have been taken away from them in cases arising between laymen as to civil matters in the reign of Henry III. If, therefore, a feoffment was made to *A. to the use of B.*, or, in other words, in

trust and confidence that *A.* would permit *B.* to enter and occupy, or receive the fruits and profits of the lands, there were no *legal* means of compelling *A.* to carry out this trust. It was simply a conscientious obligation. No doubt such obligations were enforced by the authority of the confessor, and regarded with special favor by the church. There seems no reason to question the commonplace of the text-books, that the practice of giving lands by way of use or trust was largely resorted to in order to enable ecclesiastical corporations to evade the Statutes of Mortmain.

Various conjectures have been made as to the origin of the recognition of the binding character of a trust, confidence, or use thus created. The clergy from early times recognized breach of faith as a matter of which the ecclesiastical courts would take cognizance. It is probable that some of the doctrines of Roman law greatly aided toward the establishment of the system of uses of land as a definite interest distinct from the legal estate. A strong analogy in some points to the system of uses is presented by the Roman distinction between legal and beneficial ownership. It was possible under the Roman system, before the changes introduced by Justinian, for a thing to have two owners. There was the legal owner, the *dominus ex jure civili*, or *ex jure Quiritium*, who was the complete owner in the view of the older law—who alone could dispose of or claim the thing by the processes recognized by the older law. He might, however, in certain cases pass to another the beneficial ownership without affecting his own legal rights in the view of the older law. If, for instance, the owner of a *res mancipi*—for example, a slave—sold the slave to another, and to the completion of the transaction there was alone wanting the appropriate ceremony of *mancipatio*—delivery accompanied by certain forms—the legal title remained unaffected, what passed to the purchaser was simply the beneficial, or, as it was barbarously called by the commentators, *bonitarian* ownership; in virtue of which the purchaser could in effect, by calling in aid the later Praetorian jurisdiction, assert and

exercise practically all the rights of the real owner, only he could not employ the older and more cumbrous procedure of the *jus civile*.

This analogy, however, does not carry us further than the separation of the idea of legal ownership, or ownership at the common law, from beneficial ownership, that is, ownership unrecognized by the older law, but the advantages of which can practically be asserted by calling in aid another power distinct from that of the magistrate enforcing the older law. The distinction between the two kinds of ownership was abolished by Justinian.

Another analogy was found in the Roman idea of *usus-fructus*, or the right to the temporary enjoyment of a thing, as distinct from the ownership of, or absolute property in it. This analogy, however, fails at several points. There is no binding relation between the owner and the usufructuary, by which the former is compelled to hold to the use of the latter. The relation between the two rather resembles that of a tenant for life, or other limited owner, and the reversioner in fee.

Another analogy is found in the doctrines relating to *fidei-commissa*. The legal restrictions on successions and legacies led in the later period of the Republic to the practice of a testator instituting an heir, and at the same time requesting him to dispose of the whole or a portion of the property in a particular way, for example, to hand over the inheritance or a legacy to a person who was not a Roman citizen, and therefore by the strict rule of the *jus civile* incapable of taking it directly. Till the time of Augustus there appears to have been no legal obligation on the person to whom this trust was committed. Justinian says of these *fidei-commissa*, as they were called, "*Nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur.*" Afterwards the obligation came to be recognized as one capable of being enforced in the proper court, and a Praetor *fidei-commissarius* was appointed to administer this branch of jurisdiction. At Rome "trusts" could only be created

by will, and under the later law the distinction for all practical purposes between *fidci-commissa* and legacies disappeared.

Whatever may be the true account of the origin of the recognition of uses, it appears that the practice of conveying lands to uses prevailed to a great extent as early as the reign of Edward III. It seems to have been not unusual for lay persons to make fraudulent feoffments of their lands to evade their creditors. The result was that the creditor could not have execution for his debt, the land being in the hands not of the debtor, but of his feoffee. The transaction being a collusive one, the debtor would receive from his feoffee the profits of the lands without the burdens attaching to legal ownership. This was restrained by the statute, 50 Edward III., c. 6. In the reign of Richard II. a similar practice seems to have been adopted in order to protect disseisors and other wrongdoers from the claims of the rightful owners of the land. In the same reign the practice of evading the Statutes of Mortmain by giving lands to a feoffee to hold to the use of a religious corporation was effectually restrained by 15 Richard II., c. 5. . . . If, therefore, the practice of conveying lands to uses originated in the desire of the clergy to evade the Statutes of Mortmain, the device received a final check by this enactment. It seems, however, that the advantages of being the beneficial instead of the legal owner of lands were appreciated to such a degree that the practice, although it ceased to fulfil its original purpose, became more and more widely spread.

The use of lands came to be regarded as an interest wholly distinct from the legal estate, and free from all the burdens which attached to the tenancy at common law. If a person who had only the *use* of lands (the legal title being vested in another person who was *seised to his use*), committed treason or felony, the lands were not subject to escheat or forfeiture; he who had the use owed no dues or service to the lord; his creditor could not take the lands in execution for debt; nor could a rival claimant bring an action against him

without the risk of the legal owner intervening and setting up his own legal title. On the other hand, he who had the *use* would have the full enjoyment of the lands, the feoffee, to the use would allow him to be in possession and to reap the profits, and he could dispose of and sell his interest without the necessity of the cumbrous ceremony of livery of seisin, or of any formal conveyance. Further, he could create interests wholly unknown to the common law, and could even direct the devolution of the interest by his will. It is true that neither the interest of *cestui que use*, as the beneficiary was called, nor that of his alienee was protected or recognized by law; but in this case, as so often in the history of our law, usage laid the foundation of what afterward became legal rights, and uses of land protected only by the obligations of conscience and good faith, of which the clergy were the guardians, were, it is said, by the time of Henry V. the rule rather than the exception throughout the country.

Thus a new species of interest in lands grew up differing wholly from any right recognized by the common law. What then was the foundation of the right of a person having a use, or, in other words, what was the nature of the obligation incumbent upon the person holding to the use?

At first, so far as is known, it appears to have rested simply on moral or religious obligation. There was no court or public functionary of any kind whereby the use would be protected. The only external authority by which the duty was enforced was that of the confessor. The common law courts knew nothing of *cestui que use*, and the ecclesiastical courts were powerless to help him. It so happened that, at the very time at which the practice of conveying land to uses was becoming prevalent, a new jurisdiction was rising into importance, administering justice outside the pale of the common law. This was the jurisdiction of the Chancellor.

The ordinary functions of the Chancellor were of a very ancient date. As the keeper of the Great Seal all grants and letters patent passed under his supervision. All original writs, by which actions at law were commenced, were issued

out of Chancery and sealed with the royal seal. But in issuing these writs the functions of the Chancellor were simply ministerial. He had no judicial authority. He could frame no new writ to meet a new state of circumstances. He was a prominent member of the Council, though subordinate to the great Justiciar so long as that office existed. As time went on the position of the Chancellor increased in importance. His close relations with the King armed him with a large measure of the royal power. His position as a great ecclesiastic made him solicitous for the interests of the Church, and familiar with the canon and civil law.

In early times, when the various functions of the different departments of state were ill-defined, it was the common practice for persons aggrieved, especially when for any reason they could not avail themselves of the ordinary process of law, to present petitions to the Council or to the King for redress. If a poor man was oppressed by one who, as often happened, was powerful enough to set the ordinary process of law at defiance, the remedy was to be sought from the King or the Council, who alone were strong enough to do right. Or, again, if a case arose in which no writ lay, and consequently in which there was no remedy to be had at common law, recourse could be had to the King or Council as the supreme depositaries of power. It appears that in the reign of Edward I. it became usual for the King to refer such of these petitions as were addressed directly to him to the Chancellor. In the twenty-second year of Edward III. a writ or ordinance was issued directing that for the future all such matters as were of grace should be referred to the Chancellor or to the Keeper of the Privy Seal. Hence the practice arose of presenting petitions directly to the Chancellor, upon which the Chancellor made decrees, giving or withholding redress according to principles which were certainly not always those of the common law.

This practice, which dates from the end of the reign of Edward III., or the beginning of that of Richard II., may be taken to be the cause of the rise of the judicial functions

of the Chancellor. Upon petitions thus presented the Chancellor would, if he thought fit, issue a writ, called a writ of *subpoena*, in the name of the King, commanding the person complained of to appear and answer the matter alleged against him and abide by the order of the court. This was called the writ of *subpoena* from the usual addition of the words *sub poena centum librarum*. This penalty, however, was not commonly exacted, but from the earliest times it seems to have been the practice to enforce the decrees of the Chancellor by *attachment*, that is, by arrest and imprisonment for contempt of court. Thus the Chancellor, unlike the courts of common law, had power to order things to be done, to decree that a contract should be performed, that property should be given up, that a thing creating a nuisance should be removed. From the writ above mentioned the common expression in the older law books for a proceeding in Chancery is a "writ of subpoena."

* * * * * *

It is necessary at this stage to keep clearly in view the two opposing but related interests—that of *feoffee to uses*, or, to use a more modern expression, trustee, and that of *cestui que use*, or the person beneficially interested.

The feoffee to uses is alone recognized by the common law as entitled to the land. It is from him that every alienee who is to take a legal interest must receive his title; he, and he only, is recognized as the tenant to the lord; his treason alone is the cause of forfeiture; for his debts alone can the land be taken in execution. The law knows nothing of any third person who is free from the burdens while he reaps the profits of the tenancy.

Supposing however that the feoffee attempts to exercise his legal right by alienating or charging the lands, he would, at the time we are now speaking of, be restrained from doing so, by the extra-legal, or, if the expression may be allowed, supra-legal power of the Chancellor,—a power, as has been seen, stronger than the law. Further, the Chancellor having power not only to restrain wrong-doing, but to command the

performance of acts, would order the feoffee to do any lawful acts of disposition which *cestui que use* may require of him. He would be constrained to convey his legal interest to *cestui que use* or his heir, or to a purchaser from him; to convey to the person named in *cestui que use's* will; to make the provision required by him for his family; to make a portion for his wife, or for payment of his debts; and to prosecute all actions necessary for the protection of *cestui que use's* interest.

The earliest conception of a use was, as has been seen, a trust binding on the conscience of the feoffee, a personal obligation upon him. It followed that on the death of the feoffee the heir who succeeded him was discharged of the trust, no conscientious obligation affecting *him* ever having been created. But in the reign of Edward IV., if not earlier, the heir of the feoffee was held to take the lands subject to the same trusts as his ancestor held them. The same rule was extended to the case of a person taking by alienation for valuable consideration from the feoffee, and having notice of the use. A purchaser for valuable consideration without notice held the lands free from the obligation, and in that case the only remedy of *cestui que use* would be against the feoffee personally. In like manner the lord who came into possession on an escheat, the creditor upon an *elegit*, or the husband or wife by virtue of curtesy or dower, held the land free and discharged from the use.

In tracing the history of the law of uses it is necessary shortly to enumerate the chief characteristics of uses before the legislation to be noticed in the next chapter. It follows, from what has been said as to the origin of uses, that the feoffee to uses must be an individual capable of the conscientious obligation. Hence a body corporate is incapable of holding to the use of any one. Nor were aliens, or persons attainted, or the king, capable of holding to a use.

The Court of Chancery in establishing rules regulating the interest of *cestui que use* in some respects followed the rules of law, in others departed from them. "Equity follows

the law" in respect of uses, principally in holding these interests to be subject to the same rules as to the duration and devolution of the estate as in the case of the legal interest. For instance, if a feoffment be made to *B.* and his heirs to the use of *C.* and his heirs, or to the use of *C.* and the heirs of his body, or to the use of *C.* for life, or to the use of *C.* for ten years, *C.* would have an equitable estate in fee which would descend to his eldest son, or to all his sons in gavel-kind lands, or to his youngest in borough English; or an estate tail, which might be further limited so as to be an estate in tail special or general, male or female; or an estate for life; or an estate for years, which upon *C.*'s dying within the term would devolve upon his executors.

On the other hand, the wife or husband of *cestui que use* was not entitled to dower or curtesy, nor was the lord entitled to escheat on failure of heirs, nor, except so far as certain changes were introduced by legislation, was the king entitled to forfeiture, or the creditor to take the lands in execution.

But the widest difference between the rules of common law and those which prevailed in the Court of Chancery is to be found in the manner in which uses of lands could be created or transferred. The simplest and most ordinary way of creating a use has already been referred to. For example, *A.*, tenant in fee simple, makes a feoffment to *B.* and his heirs, to the use of *C.* and his heirs. Uses might also be created by a fine or recovery levied or suffered to an expressed use. In these cases uses are said to be created by a conveyance operating by way of *transmutation of possession*; that is, they accompany one of the recognized modes of conveying the seisin at common law—feoffment, fine, or recovery. An expression of the intention of the donor that the donee should hold the lands granted to certain uses was sufficient to burden the donee with the duty of holding to the use of *cestui que use*.

But in some cases uses were said to be raised by implication; that is, though no use was expressed in the grant, yet

the circumstances were such that the Chancellor would declare that the donor intended the donee to hold, not for his own benefit, but as donee to uses. This arose principally in the case where the feoffment or other conveyance was made without consideration, that is, without an adequate motive. In this case the doctrine of the Court of Chancery was that the intention of the donor must have been that the donee should hold not for his own benefit, but for the use and benefit of the donor. The use was said to *result* or come back to the donor. Two kinds of consideration alone were regarded as affording a sufficient motive; these were *blood* or *money*. Blood, or, in other words, natural affection felt towards a near relative, would be sufficient to vest in a son, brother, nephew, or cousin, the beneficial as well as the legal interest, if the intention of the donor were expressed in a deed. This however commonly took the form of a *covenant to stand seised*, to be presently noticed. The other consideration was money, and here, so long as the conveyance is expressed to be made for a money consideration, the amount is immaterial; it is, at all events, sufficient evidence of the intention of the donor to part with the beneficial as well as the legal interest in the lands. If no proper evidence of either of these motives existed, the beneficial interest *resulted* or came back to the donor. It was in fact only an instance of the practice which seems to have become very common about the time of the Wars of the Roses, so that "the use of the country to deliver lands to be safely kept has made the mere delivery of possession no evidence of right without a valuable consideration."¹ This however did not apply to the case of a grant for life or years.

Uses raised by a conveyance operating by transmutation of possession are distinguished from uses raised without any such transmutation. Under certain circumstances a person, though he had done nothing which would be regarded at common law as a parting with his legal interest, was constrained by the Chancellor to hold to the use and benefit of

¹ Sugd. Gilb. Uses, p. 125.

another. This arose principally in the two cases of *bargains and sales*, and of *covenants to stand seised*.

A bargain and sale was where the legal owner entered into an agreement with a purchaser for the sale to him of his interest, and the purchaser paid, or promised to pay, the money for the land. The transaction would not be complete at law without a legal conveyance; but in Equity a use was "raised" in favour of the purchaser, the bargainor was in the view of the Chancellor the bare legal owner, holding to the use and for the benefit of the bargainee.

A covenant to stand seised was where a person by deed agreed to stand seised to the use of some near relation—son, brother, nephew, or cousin. In this case the consideration of natural affection was sufficient to raise a use in favour of the covenantee.

When by any of the above methods the interest of *cestui que use* had been created, that interest might, without any formality, by words or acts evidencing the intention, be transferred by *cestui que use* to any one capable of taking a use.

Another mode by which uses could be raised or transferred was by will. An instance will be found below of a feoffment made on a death-bed to the use of a will. After the death of the feoffor the feoffee would be constrained to hold to the uses declared. Thus if *A.* made a feoffment to *B.* and his heirs to the uses declared by his last will, and declared a use in favour of *C.* and his heirs, the use would, until *A.*'s death, result or come back to him. Upon *A.*'s death *C.* could claim by virtue of the will to be the equitable or beneficial owner. So a use vested in *cestui que use* could be devised by him. For example, if *cestui que use* devised that his feoffees should alien the land for payment of his debts, the creditors might compel them in the Court of Chancery to do it. Thus by the medium of uses the power of disposing of interests in lands by will was for all practical purposes regained, and was so firmly established as to withstand the attempt made in the reign of Henry VIII. to restrain it by legislation. It

should be remembered that no formality, not even writing, was required to establish a will; any evidence of the expression of the intention of a testator would be sufficient to raise a use by which the next legal owner would be bound.

Various consequences as to the capacity of dealing with the beneficial interest in lands followed upon the introduction of uses besides those above pointed out. Of these the most important were—(1) that a man might convey the beneficial interest in lands to himself. This practice, as has been before observed, was largely resorted to in troublous times when a freehold tenant wished to retain the benefits, and escape the burdens, attaching to the legal estate in lands. (2) A man might convey a beneficial interest to his wife. The Chancellor did not consider himself bound by the stringent doctrine of the common law that a married woman was incapable of holding separate property. A use declared in favour of a woman would be enforced whether the woman was married at the time or married afterwards. Thus it became a common practice for a man upon his marriage to convey lands to feoffees to the joint use of himself and his wife for life or in tail, by which means a provision for the remainder of her life was secured to the wife. This was called a jointure. Before the Statute of Uses the wife might have claimed dower in addition to this provision; by that Statute, however, when provision was made for the wife by jointure, she was put to her election whether she would claim dower or jointure, but was not allowed to claim both. Thus were laid the foundations of one of the principal classes of rights created by the Court of Chancery, the Equitable Estate of Married Women.

Id., Ch. VII., § 1. Before the passing of the Statute of Uses in the twenty-seventh year of Henry VIII., attempts had been made to protect by legislation the interests of creditors, of the king, and of the lords, which were affected injuriously by feoffments to uses. It has already been seen that the legislature at a very early date interfered in the interest of creditors to render uses liable to be taken in ex-

ecution for debt. By Richard III., c. 1, the conveyances of *cestui que use* were made good without assent of the feoffees; and by 4 Henry VII., c. 17, the lord was given the wardship of the heir. The tendency of these and similar enactments was to assimilate in some particulars the position of *cestui que use* to that of legal owner, to throw upon him some at all events of the burdens and liabilities attaching to the legal ownership. What imperfect success attended these attempts appears from the preamble of the Statute of Uses.

(b) *The Statute of Uses.*

STAT. USES (27 HEN. VIII., c. 10, 1527). Where by the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud, yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts, and also by wills and testaments, sometimes made by *nude parol* and words, sometimes by signs and tokens, and sometimes by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have had scanty any good memory or remembrance; at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances, by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, mariages, reliefs, harriots, escheats, aids pur fair fits chivalier

and *pur file marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or execution for their rights, titles and duties; also men married have lost their tenancies by the curtesy, women their dowers; manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common law of this realm; for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness or any other his subjects of this realm, shall not in any wise hereafter, by any means or inventions, be deceived, damaged, or hurt, by reason of such trusts, uses, or confidences; It may please the King's most royal Majesty, that it may be enacted by his Highness, by the assent of the Lords Spiritual and Temporal and the Commons, in this present parliament assembled, and by the authority of the same, in manner and form following: that is to say, that where any person or persons stand, or be seised, or at any time hereafter shall happen to be seised of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence, or trust in

fee simple, fee tail, for term of life, or for years, or otherwise; or any use, confidence, or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust that was in them.

4. And be it further enacted by the authority aforesaid, that whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements, and hereditaments, unto them and to their wives and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife, for term of their lives, or for term of life of the said wife, or where any such estate or purchase of any lands, tenements, or hereditaments hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointer of the wife, that then in every such case every woman married having such jointer made or hereafter to be made shall not claim nor have title to have any dower of the residue of the lands, tenements, or hereditaments that at any time were her said husband's, by whom she hath any such

jointer, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband, but if she have no such jointer, then she shall be admitted and enabled to pursue, have, and demand her dower by writ of dower after the due course and order of the common laws of this realm, this act or any law or provision made to the contrary thereof notwithstanding.

9. And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements, and hereditaments, to the great trouble of the King's subjects, the King's most royal Majesty, minding the tranquillity and rest of his loving subjects, of his most excellent and accustomed goodness is pleased and contented that it be enacted, by the authority of this present parliament, that all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May that shall be in the year of our Lord God 1536, of any lands, tenements, or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner, and form as they were commonly taken and used at any time within forty years next afore the making of this act, anything contained in this act, or in the preamble thereof, or any opinion of the common law to the contrary thereof notwithstanding.

N. Y. REAL PROP. LAW, § 70. Every estate which is now held as a use, executed under any former statute of the State, is confirmed as a legal estate.

§ 72. Every person who, by virtue of any grant, assignment, or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

§ 73. Every disposition of real property, whether by deed or by devise, shall be made directly to the person in

whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

(c) *Operation of the Statute.*

1 CO. REP., 124. It would be absurd to say that the makers of this act intended to preserve uses, when they expressly say that they intended to extirpate and extinguish uses. Also it is absurd to think that the makers of this act intended to preserve, etc., *quodam modo* to revive the ancient common law, and yet intended to preserve or continue any such abuse and fraud which tendeth to the overthrowing of the common law. For they have declared, that the invention of these uses was subtle, fraudulent, and crafty in disinherison of heirs, in defrauding of lords, of those who had right of their lawful actions, of purchasers, of tenant in dower, of tenant by the curtesy, causes of manifest perjury in defrauding the king and lords of their escheats, etc., in subversion of the ancient common laws, and the cause of many other inconveniences, and the occasion of great trouble and disturbance in the commonwealth. I say, it would be absurd to think that the makers of the act intended not only to continue, but to increase and preserve such wickedness, mischiefs, and inconveniencies.—*Chudleigh's Case*.

BACON, USES, TRACTS, 324. This statute, as it is the statute which of all others hath the greatest power and operation over the heritages of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet in itself is most perfectly and exactly conceived and penned

of any law in the book. 'Tis induced with the most declaring and persuading preamble; 'tis consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes; and lastly, 'tis the best ponder'd in all the words and clauses of it of any statute that I find.

GILB., USES, 73. The Design of this Law was utterly to abolish and destroy that pernicious Way of Conveyance; and the Means they took to do it was to make the Possession fall in with the *Use* in the same Manner as the *Use* was limited; and where they were all Freeholds, it was thought they would be then subject to the Rules of Common Law; but the Method has not answered the Legislature's Intent; for it has introduced several Sorts of Conveyances quite opposite to the Rules of Common Law; for now wherever a *Use* is raised, the Statute gives *cestui'que use* the Possession; so that 'tis only necessary to form a *Use*, and the Possession passes, without any Livery or Record at all; and the Reversions, without the Attornment of particular Tenants; and how the other Purposes of the Statute be evaded will after appear.

SUG., GILB. USES, 139. "The design of this law was utterly to abolish and destroy that pernicious way of conveyance."—*Gilbert*.

Bacon supports at length the contrary opinion, and upon grounds which appear to be unanswerable. *Uses*, p. 39; and see *Dy. 362, b, pl. 31*. The object of the statute was to turn equitable into legal estates—beyond this the legislature does not appear to have been solicitous to provide, although from the prevalence of bargains and sales, they afterwards for the sake of notoriety, required them to be by indenture enrolled. The intention of the Statute of Uses was evaded not by the continuance of the same mode of conveyance, but by equity upholding uses under the name of trusts. The Statute of Enrolment was, in a great measure, rendered a

nullity by the introduction of the conveyance by lease and release. . . . See Hargr. n. (3), Co. Lit., 48, *a*. So that now, as Lord C. J. Vaughn observed, the principal use of the statute of 27 [Hen. VIII.] is not to bring together a possession and use which at one time were separate, the one from the other, but to introduce a general form of conveyance by which persons may execute their intents and purposes at pleasure, either by transferring their estates to strangers, by enlarging, diminishing, or altering them to and among themselves at their pleasure, without observing that rigour and strictness of law for the possession, as was requisite before the statute. Vaugh. 50. Lord Hardwicke has observed that by means of trusts this statute, made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. 1 Atk. 591. It is inaccurate to say that the statute *introduced* several sorts of conveyances (see the text). The old conveyances continued, but had a *legal* operation given to them by the statute. It may here be observed that if an estate would be executed by the statute, as a good *use*, it would be equally within the statute if limited in words as a *trust*. Therefore a conveyance to A. and his heirs, *in trust* for B. and his heirs, would be executed as effectually as if the words had been to *the use* of B. and his heirs.—*Sugden's note*.

DIGBY, HIST. REAL PROP., Ch. VII., § 1. The object of that Statute was, by joining the possession or seisin to the use and interest (or, in other words, by providing that all the estate which would by the common law have passed to the grantee to uses should instantly be taken out of him and vested in *cestui que use*), to annihilate altogether the distinction between the legal and beneficial ownership, to make the ostensible tenant in every case also the legal tenant, liable to his lord for feudal dues and services—wardship, marriage, and the rest. As will be pointed out in the next chapter, by converting the use into the legal interest, the Statute

did away with the power of disposing of interests in lands by will, which had been one of the most important results of the introduction of uses. Probably these were the chief results aimed at by the Statute of Uses. A strange combination of circumstances—the force of usage by which practices had arisen too strong even for legislation to do away with, coupled with an almost superstitious adherence on the part of the courts to the letter of the Statute—produced the curious result, that the effect of the Statute of Uses was directly the reverse of its purpose, that by means of it secret conveyances of the legal estate were introduced, while by a strained interpretation of its terms the old distinction between beneficial or equitable and legal ownership was revived. What may be called the modern law of Real Property and the highly technical and intricate system of conveying which still prevails, dates from the legislation of Henry VIII.

Id., § 2. It will be easily seen that the Statute at once enabled a tenant in fee simple to deal with his lands in ways which would have been impossible at common law. For instance, at common law a man cannot convey to himself any interest in lands. Thus, suppose *A.* and *B.* are jointly seised of lands as trustees, and *A.* dies, whereby the whole estate vests in *B.*, and it is desired to appoint *C.* a new trustee, and to vest the lands in *B.* and *C.* jointly. Before the Statute it would have been necessary for *B.* to make a feoffment with livery to *D.* and his heirs, so that *D.* might make a feoffment with livery to *B.* and *C.* and their heirs; after the Statute the same object might be effected by one conveyance, namely, to *D.* and his heirs to the use of *B.* and *C.* and their heirs. This is the ordinary mode of vesting trust-estates in a new trustee. So, by bringing the Statute into operation, a man may convey a legal estate to his wife, which is impossible at common law.

LEAKE, LAND LAW, 115. The statute executes the use, that is to say, invests it with the seisin or legal title, and

subjects it to all the incidents of a legal estate. The grantee to uses is divested of all estate and interest in the land, and the *cestui que use* becomes seised or possessed in law of the same estate and interest which is limited to him in the use. The possession transferred by the statute is equivalent, for most purposes, to that acquired by livery of seisin, or, in case of leaseholds, by entry.

CHAPTER II.

TRUSTS.

(a) *Their Origin.*

1 EQ. CAS. ABR., 383. Notwithstanding this statute (27 Hen. VIII., c. 10) there are three ways of creating an use or a trust which still remains as at common law, and is a creature of the Courts of Equity, and subject only to their controul and direction. 1st. Where a man seised in fee raises a term of years and limits it in trust for *A.*, etc., for this the statute cannot execute, the termor not being seised. 2ndly. Where lands are limited to the use of *A.* in trust to permit *B.* to receive the rents and profits, for the statute can only execute the first use. 3rdly. Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons, for here the lands must remain in them to answer these purposes: and these points were agreed to. Trin. 1700.—*Symson and Turner, per Curiam.*

DIGBY, HIST. REAL PROP., Ch. VII., § 4. The object of the framers of the Statute of Uses was undoubtedly to do away with the distinction between the legal estate and the beneficial interest in lands which had given rise to the mischiefs recited in the preamble of the Statute. The properties which before the Statute had gathered round the beneficial interest or use under the judicial legislation of the Chancellors now with some modification attached to the legal interest in lands. The modifications which the legal interest in lands consequently underwent, the increased powers of disposition and control which the owner in fee acquired, have already been traced. But in some points the Statute fell

short of what was required. The principle that a conscientious obligation unrecognized by the law might be enforced by the Chancellor was not affected by the Statute. If therefore there still were found cases of the creation of legal estates upon trust for certain purposes, which estates could not be *executed* or transferred from the common law grantee to the beneficiary by the force of the Statute, it would be still within the power of the Chancellor to decree that the conscientious obligations should be carried out.

This occurred principally in three cases. In the first place an active duty might be imposed on the grantee of the land to do certain acts in reference to it for the benefit of somebody else. Land might be granted to *A.* upon trust to collect and pay over the rents to *B.* Here it would be evidently intended that *A.* should be legal owner, but a conscientious obligation would bind him to carry out the trust upon which he had received the land. Where, therefore, an active duty was imposed on the common law grantee, the use or trust was not executed by the Statute, but it was left to be enforced by the Court of Chancery. It is not always in practice an easy matter to say when the trust which is imposed on the legal owner is in the nature of an active duty, or when it is a use, trust, or confidence executed by the Statute. If lands are conveyed to *A.* upon trust to allow *B.* to receive the profits, no active duty being imposed on *A.*, this use is within the Statute and is executed, the legal estate vesting in *B.*

The second case was where a trust was declared upon a leasehold interest. It has already been seen that this case is not provided for by the Statute. If, therefore, a term of ten years be given to *A.* in trust for *B.*, the legal estate vests in *A.*, and the trust could (before November 1, 1875) only be enforced by the Court of Chancery.

But the most important defect, to remedy which the jurisdiction of the Court of Chancery was ultimately called into action, arose from the strange doctrine laid down in *Tyrell's case*.¹

¹ *Dyer*, 155, *a*; *Digby*, 375.

It has often been remarked that English law bears traces of the realist doctrines of the Schoolmen. To deal with the conception of a use of lands as if it were a real thing, and to draw practical conclusions, however inconvenient, from this abstract idea, seemed perfectly natural to the lawyers of the sixteenth century. Thus it was a matter of most serious consideration in what manner the use could be preserved so as to arise and take effect in the case of future contingent uses. For instance, in a conveyance to *A.* and *B.* and their heirs to the use of *C.* and his heirs till the marriage of *D.*, and afterward to the use of *D.* for life, remainder to the use of *D.*'s eldest son, etc., it was made a grave question whether any rational account could be given of the reason why these future uses took effect. The ability of the common law seisin to furnish forth the use had been exhausted, it had supplied the vested legal interest of *C.* to an extent co-extensive with itself, but how was it to supply that of *D.* and of his unborn son besides? Who could be said to be seised to the use of *D.*'s unborn son? It is impossible even to state these difficulties in language intelligible to us, so completely has the mode of thought which gave them birth passed away. But such was the spirit in which the Statute of Uses was construed.

Reasoning of a similar character led the lawyers to hold that, when once the Statute had been called into operation, its powers were exhausted, and that, if a feoffment were made to *A.* and his heirs to the use of *B.* and his heirs to the use of *C.* and his heirs, it was impossible to give any effect to the limitation in favor of *C.* That "a use could not be engendered of a use" seemed no doubt a natural and intelligible proposition to Saunders, C. J. It is a specimen of a rule of law with the most important consequences springing not from any consideration of its relation to expediency or to the wants of the community, but from an exaggerated conception of the mysterious qualities possessed by "a use of lands," and the consequences which flowed from them.

Thus the doctrine arose that there could not be a use upon

a use. If, therefore, *A.* bargained and sold to *B.* to the use of *C.*, the second use was considered wholly void. No consideration was paid to the obvious intention of the transaction, the consequence was supposed to follow from the nature of the use. Here then was a case for the interference of the Chancellor. It appears that by the time of Sir E. Coke the uses upon uses which the common law courts refused to recognize were enforced in Chancery. Thus was restored the distinction between the equitable and the legal estate, which it had been the design of the Statute of Uses to abolish.

These second uses were thenceforth known under the name of trusts. If lands were conveyed to *A.* and his heirs, to the use of *B.* and his heirs, in trust for *C.* and his heirs, *B.* had the legal estate by force of the Statute of Uses. *C.*'s interest was wholly created and protected by the Court of Chancery. So if lands are conveyed to *A.* and his heirs to such uses as he shall appoint; and he appoints to *B.* and his heirs to the use of *C.* and his heirs, the legal estate is vested in *B.*, and *C.*'s interest is equitable only. For all practical purposes *C.* is the owner of the estate. He can call upon *B.* to convey to him or his nominee; he can himself part with his interest to another person, for whom *B.* will, upon notice given to him, be a trustee; *C.*'s estate will descend to his heir, according to the rules of law.

Such is the origin of modern trusts under which so large a portion of the land of the country is held. The student must accustom himself to the use and meaning of these technical terms. The *legal estate* is vested in the *trustee, in trust for the cestui que trust*, who has the *equitable estate*. Whenever the rules of law are applicable, trusts or equitable estates or interests follow those rules. Thus an equitable estate may be created in fee, in tail, for life, or for years; an equitable estate tail may be barred in the same way as a legal estate tail; it will descend *ab intestato* according to the rules regulating legal estates; future estates in remainder and executory interests can be created in the same way, and

are subject to the rule against perpetuity; the husband of *cestui que trust* is entitled to an estate by the curtesy, and the widow (since 3 and 4 Will. IV., c. 105) to dower.

Besides the creation of trusts of lands expressly by a declaration of the intent of the grantor, which, though complete in itself, is insufficient to convey the legal estate, there is also a large class of what are called *implied trusts*. This is too large a subject to be discussed here, and it must be sufficient to say that wherever, according to the principles which regulated the action of the Court of Chancery as it existed before November 1, 1875, it would be inequitable from circumstances of fraud, mistake, or otherwise, for the legal owner of the land to be also the beneficial owner, the legal owner will be held to be a trustee for the person who is in equity entitled to the lands. Thus if a person has agreed to buy land, and has paid the purchase-money without receiving a formal conveyance, the legal owner will be held to be a trustee for him.

(b) *Nature of the Trust Estate.*

1 WM. BL., 179. A Difference was attempted to be made between Uses and Trusts. I have seen Trusts invented for the blackest Purposes in my Experience, and to subvert the very Constitution of this Kingdom. But this is nothing but Abuse of both. But to try if there is or is not any Difference between them, the best Way is to define both: as, in order to shew the Difference between one Thing and another, 'tis usual to define the one and the other, and by comparing the Definitions find the Difference. *Finch, L.*, 2, c. 22, fo. 22, b, says an *Use* is, where a Man has any Thing to the Use of another upon Confidence, that the other shall take the Profits: He who has the Profits, has an Use. The other Books say an Use is neither *Jus in Re* nor *ad Rem*, etc. Now what is a Trust? A Confidence for which the Party is without Remedy, but in a Court of Equity. Lord Chief Justice

does not state any Difference in the metaphysical Essence between an Use and a Trust, but that there was a Difference in the Law by which the one and the other was directed; and I think there is no Difference in the Principles, but there is a wide Difference in the Exercise of them. It was as much a Principle of this Court, that the Use should be considered as the Land, or as imitating the Land, formerly as now; though the Rules were not carried formerly so far, nor the Reasoning nor Directions (when they were less understood) as at present. To give a similar Instance: The Elements and Principles of Geometry were the same in *Euclid's* Time as in *Sir Isaac Newton's*, though in the latter's Time the Use of them was much enlarged.

It was said, the Difference consists in this: That Equity has shaped them much more into real Estates, than before when they were Uses. As now, there is Tenancy *per* Curtesy of a Trust; they may be intailed; and those Intails barred by a Recovery. But why? Not from any new Essence they have obtained, but from carrying the Principle farther, *quia Æquitas sequitur Legem*: For, as between the Trustee and the *Cestui que Trust*, this Court had Jurisdiction; and I think they should have equally extended in this Court the Rules and Principles of Uses, as well as Trusts.

This, therefore, was the Effect of the equitable Jurisdictions growing to Maturity. Lord *Bacon* says, they grew to Credit and Strength by Degrees. He says, an Use is nothing but a general Trust, where a Man will trust to the Conscience of another, rather than to his own Estate and Possession. That an Use and Trust are the same, seems adopted by all the great Persons who have presided in this Court. *Gray against Gray*, 29 Car. 2.—*Per* Henley, Lord Keeper, in *Burgess v. Wheate*.

Id., 155, 160, 162. The opposition [between uses and trusts] is not from any metaphysical difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the

opposition consists in the difference of the practice of the Court of Chancery. If uses before the Stat. of H. 8 were considered as a pernanity of the profits, as a personal confidence, as a *chose in action*; and now trusts are considered as real estates, as the real ownership of the land; so far they may be said to differ from the old uses; though the change may not be so much in the nature of the thing, as in the system of law made use of upon it. . . .

In my apprehension, trusts were not on a true foundation till Lord Nottingham held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational and uniform system of law has been since raised. Trusts are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief which the Stat. Hen. 8 meant to avoid.

The forum where it is adjudged is the only difference between trusts and legal estates. Trusts here are considered as between the *cestui que trust* and trustee, and all claiming by, through, or under them, or in consequence of their estates, as the ownership and as legal estates, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. The Statute of Frauds speaks of devises only of lands and tenements; yet the trust, being considered in this court as the land and tenement, can only be devised as lands and tenements may pursuant to that statute. . . .

It would be endless and unnecessary to enumerate the various consequences through which the principle has been pursued that a trust in Chancery is the estate at law, since 22 Car. 2. Among others it has been declared that the husband should be tenant *per curtesy* of a trust. The case of dower is the only exception, and not on law and reason, but because that wrong determination had misled in too many instances to be now altered and set right. . . .

To conclude this head. An use or trust heretofore was,

while it was a use, understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que trust* and all claiming under him in like privity. Nobody in the *post* was entitled under, or bound by, the agreement. But now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared it results by necessary implication; because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice.—*Per* Lord Mansfield, in *Burgess v. Wheate*.

LEAKE, LAND LAW, 131. The system of trusts is formed upon the same general principles of equity as that of uses before the Statute; but it has been much more largely developed, and in some points with different results. Like uses before the Statute, trusts may be raised by express declaration, or by construction of equity; and they may be raised upon two conditions of the legal estate—upon a conveyance of the legal estate, vesting it in another for the purpose of or subject to the trust—or without any such conveyance, by severing the equitable interest from the legal estate as previously vested, leaving the legal owner in the position of trustee. Upon a conveyance of the legal estate, a declaration of trust is sufficient to denote the intention of the conveyance, and to direct the course of the trust or equitable estate. If the legal conveyance is effectually made, the Court of Equity enforces the trust according to such direction.

Id., 126-129. The *cestui que trust* is entitled in equity to the possession and enjoyment of the land, or to receive the profits or proceeds of it, and to dispose of the same according to the terms of the trust. The result is sometimes expressed by the phrase, that in the Court of Chancery “the equity is the land”; and the *cestui que trust* is

said, by analogy, to be *seised* or *possessed* of an equitable estate.

The Court of Equity recognizes the legal owner of the land and admits his title, but makes him wholly subservient to the equitable owner. It restrains him from exercising his legal rights for his own benefit, and compels him to hold, defend, and dispose of the legal estate for the sole purpose of maintaining and realizing the equitable estates and interests prescribed in the trust. The *cestui que trust*, in general, may compel the trustee to put him in possession of the property to which he is beneficially entitled; but where the *cestui que trust* is not exclusively interested, and other parties have also claims, the court will exercise a discretion as to whether the possession shall remain with the trustee or be given to the *cestui que trust*, subject to such claims and with proper securities for them.

The jurisdiction of the courts of law, on the other hand, is confined to the legal ownership, at least in theory, and in regulating the rights of property takes no cognizance of any trust or equitable estate or interest. In relation to the trustee or legal owner, the *cestui que trust*, if in possession, though in accordance with the trust, is in the position of a mere tenant at will; and with regard to the legal title, as against strangers, the possession of the *cestui que trust* is the possession of the trustee.¹

There may thus be two different titles to the same land subsisting concurrently, the legal and the equitable title, regulated respectively by the different systems of law and equity, but the title at law being held in subservience to the equitable title. A title to land is not complete unless it is

¹ *Parker v. Carter*, 4 Hare, 400. Notwithstanding doctrines advanced by Lord Mansfield in the last century, at the present day it may be regarded as established: First, that a *cestui que trust* cannot recover in ejectment in his own name, but must bring his action in the name of the trustee, who must be indemnified against the costs; secondly, that the trustee, as the tenant of the legal estate, may recover in ejectment from his own *cestui que trust*, who has no defence to the action at law, but must have recourse to an injunction in equity. Lewin, 440.

fully recognized under both systems ; and a purchaser under a contract of sale is entitled, in general, to have conveyed to him a good title both at law and in equity. . . .

If the absolute equitable and legal titles unite in one person, the law alone is sufficient to maintain the rights of the owner, and equity does not, in general, interfere ; in such case the equitable estate is said to merge in the legal and no longer exists ; the beneficial use and enjoyment is referred wholly to the legal title.

Where the legal estate is held simply upon trust for another absolutely, the *cestui que trust* may be entitled in equity to have the legal estate conveyed to him, so as to invest the equitable interest with the legal estate. But when, as generally is the case in the creation of trusts, many persons are interested concurrently or successively, and each *cestui que trust* has only a partial interest, it is then no part of his right to have the legal estate, but it is essential that the legal estate should remain in the trustee in order to support the various equitable estates and interests.

Id., 139. In the regulation of trusts, equity, in general, follows the law ; except where the different nature of the jurisdiction excludes any analogy.

Id., 140. But the rules of tenure have no application to the equitable estate ; for the trustee is equally recognized to be the legal tenant, bound by the duties of tenure, in equity as at law.

Id., 143. The land, remaining at law the property and at the disposal of the trustee, is subject, in his hands, to all the incidents of legal ownership. It passes by his conveyance or devise, or descends to his heir. But the trust, or equitable title, is, for the most part, independent of the casualties affecting the legal ownership and, as a general rule, follows and attaches upon the land through all the devolutions of the legal title. All persons who take through or under the trustee, as his grantee (except a purchaser for value without notice of the trust), devisee, heir, executor, or administrator, are equally bound by the trust. Also creditors of

the trustee, obtaining execution against the property held in trust in exercise of their legal right, would be restrained in equity or would themselves be declared to be trustees. So a trustee in bankruptcy has no claim against property held by the bankrupt upon trusts.

An exception occurs with a purchaser acquiring the legal estate from the trustee for a valuable consideration and without notice of the trust. The trust is thereby displaced and extinguished as to the land; for the purchaser, in such case, has an equal equity with the former equitable owner, and having the legal estate is allowed to retain it, according to the maxim, *in æquali jure melior est conditio possidentis*. The former equitable owner is left to his claim against the trustee personally for the breach of trust in parting with the trust property. The purchaser for value without notice can convey a good title, discharged of the trust, even to a purchaser with notice, except to the trustee who committed the breach of trust; in whose hands the land, though purchased for value, would be restored to the trust, in order to meet his original breach of trust. A purchaser or person acquiring the trust property from a trustee, without giving any value or consideration for it, as by a voluntary gift or devise, is charged with the trust and all equities affecting the property to the same extent as the trustee from whom he took, whether he had notice of the trust or not.

LEWIN, TRUSTS, 822. Until the recent Act [47 & 48 Vict., c. 71] a trust in fee of lands was not subject to escheat. This was determined in the great case of *Burgess v. Wheate* (1 Eden, 176; s. c. 1 W. Bl. 123), before Lord Northington, assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges will amply repay a very careful perusal. It may be mentioned generally that Sir T. Clarke and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by *uses*, and, therefore, as no escheat in

equity was of a use, there could be none of a trust. But this position is too large; for trusts do not follow absolutely the law of uses; for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine that, as lands escheat at law, so trusts must escheat in equity; that trusts, since the statute of H. 8, are not regulated by uses, but the maxim is, "Equity follows law,"—"The *trust* is the *estate*." But to this it must be answered that a trust has always been recognized as a thing *sui generis* and not as identical with the legal fee: it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8; he agreed with Lord Mansfield that trusts imitated the legal possession; but he added the qualification, *as between the privies to the trust only*, and not as respected strangers: his objection to the claim of the lord was, that it was for the execution of a trust that did not exist: where there was a trust it should be considered in that court as the real estate *between the cestui que trust and the trustee and all claiming by or under them*; and the trustee should take no beneficial interest that the *cestui que trust* could enjoy; but he knew of no instance where that court ever permitted the creation of a trust to affect the right of a third person.

The result of the determination in *Burgess v. Wheate*, as followed in more recent cases, was that, where the owner of the equitable fee died intestate without heirs, the trustee retained the estate. . . . Now, by "The Intestates' Estates Act, 1884," where a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of

escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.¹

N. Y. REAL PROP. LAW., § 71. Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

§ 75. An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.

§ 76. An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors.
2. To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto.
4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by law.

§ 78. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable for the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.

§ 80. Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or

¹ Similar statutes have been enacted in most of the United States.—
Ed.

interest in the property, but may enforce the performance of the trust.

§ 83. The right of a beneficiary of an express trust to receive rents and profits of real property and apply¹ them to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder.

§ 84. Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.

§ 85. If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. . . .

§ 89. When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

§ 91. On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court. . . .

C. JOINT OWNERSHIP.

CHAPTER I.

JOINT TENANCY.

DIGBY, HIST. REAL PROP., Chap. V., § 4. Another class of rights which attained greater precision during the interval under consideration [from the end of the reign of Edward I. to the end of the reign of Henry VIII.] and assumed the characteristics which they have possessed ever since, are those which are enjoyed by two or more persons who are simultaneously entitled to rights of property over the same piece of land. From the earliest times it must have been common for two or more persons to have undivided interests of some kind in land. By the time of Littleton three kinds of undivided ownership had come to be distinguished as having different attributes. The persons entitled are called *joint-tenants*, *tenants in common*, *coparceners*. The main characteristics of this class of rights will sufficiently appear from the subjoined extracts. The point of resemblance between the three kinds is that the co-owners have no separate estate or interest in any distinct portion of the land over which they have simultaneously rights of property, they are each interested, according to the extent of their share, in every part of the whole land and its proceeds.

LIT., § 277. *Joyntenants* are as if a man bee seised of certaine lands or tenements, &c., and infeoffeth two, three, foure, or more, to have and to hold to them for terme of their lives, or for terme of another's life, by force of which feoffement or lease they are seised; these are joyntenants.

§ 278. Also, if two or three, &c., disseise another of any lands or tenements to their own use, then the disseisors are joyntenants. But if they disseise another to the use of one of them, then they are not joyntenants; but hee to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c.

§ 280. And it is to be understood, that the nature of joyntenancy is, that hee which surviveth shall have only the entire tenancie, according to such estate as hee hath, if the joynture be continued, &c. As if three joyntenants bee in fee-simple, and the one hath issue and dyeth, yet they which survive shall have the whole tenements, and the issue shall have nothing.¹ And if the second joyntenant hath issue and dye, yet the third which surviveth shall have the whole tenements to him and to his heires for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dyeth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heires, so as they shall have this by descent, and not by survivor as joyntenants shall have, &c.

§ 281. And as the survivour holds place betweene joyntenants, in the same manner it holdeth place betweene them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements bee made to many for terme of yeares, hee, which survives of the lessees, shall have the tenements to him only during the terme by force of the same lease. And if a horse or any other chattell personall be given to many, hee which surviveth shall have the horse onely.²

§ 282. In the same manner it is of debts and duties,

¹ This is the essential characteristic of joint-tenancy, distinguishing it both from coparcenary and from tenancy in common.—*Digby*.

² There is and has always been an exception in the case of property jointly owned for purposes of trade: the maxim being, "Jus accrescendi inter mercatores locum non habet."—*Digby*.

&c., for if an obligation be made to many for one debt, hee which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c.

§ 283. Also, there may be some joyntenants which may have a joint estate, and be jointenants for terme of their lives, and yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moitie and the issue of the other shall have the other moiety of the land, and they shal hold the land betweene them in common, and they are not joyntenants, but are tenants in common. . . .

§ 285. Also, if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee-simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements bee given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee-taile, &c.

§ 287. Also if there be two joyntenants of land in fee-simple within a borough where lands and tenements are devisable by testament, and if the one of the said two joyntenants deviseth that which to him belongeth by his testament, &c., and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion which surviveth, by the survivor, the which hee doth not claim, nor hath anything in the land by the devisor, but in his own right by the survivor according to the course of law, &c., and for this cause such devise is void. But otherwise it is of parceners seised of

tenements devisable in like case of devise, &c. *causa qua supra*.

§ 288. Also it is commonly said that every jointenant is seised of the land which hee holdeth joyntly *per my et per tout*; and this is as much to say, as he is seised by every parcell and by the whole, &c., and this is true, for in every parcell and by every parcell and by al the lands and tenelements he is joyntly seised with his companion.

§ 290. Also, joyntenants (if they will) may make partition betweene them, and the partition is good enough; but they shall not bee compelled to doe this by the law; but if they will make partition of their own will and agreement, the partition shal stand in force.

Co. Lit., 187, a. This is true regularly; but by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition. But since *Littleton* wrote joyntenants and tenants in common generally are compellable to make partition by writ framed upon the statutes of 31 & 32 H. 8. And albeit they be now compellable to make partition, yet, seeing they are compellable by writ, they must pursue the statutes and cannot make partition by *parol*, for that remaines at the common law.

Lit., § 291. Also, if a joynt estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but a moiety, and the third person shall have as much as the husband and wife, viz., the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joyntenants, when the one hath by force of the joynture the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causa qua supra*.

2 BL. COM., 179-182. The properties of a joint-estate are derived from its unity, which is fourfold: the unity of *interest*, the unity of *title*, the unity of *time* and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they must have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to *A.* and *B.* for their lives, this makes them joint-tenants of the freehold; if to *A.* and *B.* and their heirs, it makes them joint-tenants of the inheritance. If land be granted to *A.* and *B.* for their lives, and to the heirs of *A.*; here *A.* and *B.* are joint-tenants of the freehold during their respective lives, and *A.* has the remainder of the fee in severalty: or if land be given to *A.* and *B.* and the heirs of the body of *A.*; here both have a joint-estate for life, and *A.* hath a several remainder in tail. Secondly, joint-tenants must also have a unity of *title*; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party; and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be a unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to *A.* and *B.*; or a remainder in fee to *A.* and *B.* after a particular estate; in either case *A.* and *B.* are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of *A.* and *B.*; and during the continuance of the particular estate

A. dies, which vests the remainder of one moiety in his heir; and then *B.* dies, whereby the other moiety becomes vested in the heir of *B.*; now *A.*'s heir and *B.*'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times: because the use of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy there must be a unity of possession. Joint-tenants are said to be seised *per my et per tout*, by the half or moiety, and by *all*; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.

4 KENT COMM., 361. The common law favored title by joint-tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services and weaken the efficacy of that connection. But in *Hawes v. Hawes*, 1 Wils. Rep. 165, Lord Hardwicke observed that the reason of that policy had ceased with the abolition of tenures; and he thought that even the courts of law were no longer inclined to favour them, and, at any rate, they were not favoured in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also re-

jected in all cases of partnerships, for it would operate very unjustly in such cases. In this country the title by joint-tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees.

In New York, as early as 1786, estates in joint-tenancy were abolished, except in executors, and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint-tenancy. The *New York Revised Statutes* (1 R. S. 727, sec. 44) have re-enacted the provision, and with the further declaration, that every estate, vested in executors or trustees, as such, shall be held in joint-tenancy. The doctrine of survivorship incident to joint-tenancy (excepting, I presume, estates held in trust) is abolished in the States of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Tennessee, North and South Carolina, and Alabama. In the States of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, Michigan, Illinois, and Delaware, joint-tenancy is placed under the same restrictions as in New York; and it cannot be created but by express words; and, when lawfully created, it is presumed that the common law incidents belonging to that tenancy follow. The English law of joint-tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi, and Maryland.

N. Y. REAL PROP. LAW, § 56. Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint-tenancy; but every estate vested in executors or trustees as such shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

CHAPTER II.

TENANCY IN COMMON.

LIT., § 292. *Tenants in common* are they which have lands or tenements in fee-simple, fee-taile or for terme of life, &c., and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by severall titles and not by one joynt title, and their occupation and possession shall be by law betweene them in common, they are called tenants in common. As if a man infeoff two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common, because they are in such tenements by severall titles, for the alienee cometh to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion, &c. And so they are in by severall titles, that is to say, by severall feoffements, &c.

§ 294. Also, if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joyntenants; but yet the other two joyntenants are seised of the two parts which remain joyntly, and of these two parts the survivor between them two holdeth place, &c.

§ 298. Also, if lands bee given to two to have and to hold, *scil.* the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.

§ 299. Also, if a man seised of certaine lands infeoff another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the feoffment, then the feoffee and feoffor shall hold their parts of the land in common.

§ 301. Also, if a man let lands to two men for terme of their lives, and the one grants all his estate of that which belongeth to him to another, then the other tenant for terme of life and he to whom the grant is made are tenants in common during the time that both the lessees be alive.

And *memorandum*, that in all other such like cases, although it be not here expressly moved or specified, if they be in like reason they are in the like law.

§ 304. And if three joyntenants be, and the one release by his deed to one of his companions all the right which he hath in the land, then hath he to whom the release is made the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in joynture. And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common.

§ 309. Also, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

§ 310. Also *note*, that tenants in common may bee by title of prescription, as if the one and his ancestors or they whose estate he hath in one moitie have holden in common the same moitie with the other tenant which hath the other moity, and with his ancestors, or with those whose state he hath undivided, time out of minde of man. And divers other manners may make and cause men to be tenants in common, which are not here exprest, &c.

§ 318. Also, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition betweene themselves by their agreement and consent,

such partition is good enough, as is adjudged in the book of assises.

§ 319. Also, as there bee tenants in common of lands and tenements, &c., as aforesaid, in the same manner there be of chattells reals and personals. As if a lease bee made of certaine lands to two men for terme of twenty yeares, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the terme, then hee to whom the grant is made and the other shall hold and occupie in common.

§ 320. Also, if two have joyntly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himselfe belongeth of the same ward, then the grantee and the other which did not grant, shall have and hold this in common, &c.

§ 321. In the same manner it is of chattels personals. As if two have joyntly by gift or by buying a horse or an oxe, &c., and the one grant that to him belongs of the same horse or oxe to another, the grantee and the other which did not grant shall have and possesse such chattels personals in common. And in such cases, where divers persons have chattels real or personall in common and by divers titles, if the one of them dieth the others which survive shal not have this as survivor, but the executors of him which dieth shall hold and occupie this with them which survive, as their testator did or ought to have done in his life-time, &c., because that their titles and rights in this were severall, &c.

2 BL. COM., 191-194. Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold

by descent, the other by purchase; or the one by purchase from *A.*, the other by purchase from *B.*; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to *A.* in tail, and the other gives his to *B.* in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten: and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of *A.*, and the other as heir of *B.*; and those two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made,

but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint-estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common; because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common; and, if one grants to another *half* his land, the grantor and grantee are also tenants in common; because, as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to *A. and B., equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (for it implies no more than the law has annexed to that estate, *viz.*, divisibility), yet in *wills* it is certainly a tenancy in common; because the deviser may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to *A. and B. to hold as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the

statutes of Henry VIII. and William III., before mentioned, to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common.¹ Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. c. 22; and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession.

¹ But a tenancy in common with benefit of survivorship may exist without being a joint-tenancy, because survivorship is not the only characteristic of a joint-tenancy. *Per* Bayley, J. 1 M. & S. 435.—*Chitty*.

CHAPTER III.

PARCENARY.

LIT., § 241. *Parceners* are of two sorts, to wit, parceners according to the course of the common law, and parceners according to the custome. Parceners after the course of the common law are where a man or woman, seised of certain lands or tenements in fee simple or in taile, hath no issue but daughters and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heire to their ancestour. And they are called parceners, because by the writ which is called *breve de participatione facienda* the law will constraine them that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they bee called two parceners, and if there be three daughters they bee called three parceners, and four daughters four parceners, and so forth.

§ 242. Also, if a man seised of tenements in fee simple or in fee tayle dieth without issue of his bodie begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shal not be called parcener, but shee is called daughter and heir, &c.

§ 243. And it is to bee understood that partition may be made in divers maners. One is when they agree to make partition and do make partition of the tenements; as if there bee two parceners to divide between them the tenements in two parts, each part by it selfe in severalty and of equall

value; and if there be three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

§ 247. Also, there is another partition. As if there be foure parceners, and they will not agree to a partition to be made betweene them, then the one may have a writ of *partitione facienda* against the other three, or two of them may have a writ of *partitione facienda* against the other two, or three of them may have a writ of *partitione facienda* against the fourth, at their election.

§ 250. And note, that partition by agreement betweene parceners may be made by law betweene them, as well by parol without deed as by deed.

§ 254. And note that none are called parceners by the common law but females or the heirs of females which come to lands or tenements by descent; for if sisters purchase lands or tenements, of this they are called joint tenants and not parceners.

§ 265. Parceners by the custom are where a man seised in fee simple or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behoveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales.

2 BL. COM., 188. The *properties* of parceners are in some respects like those of joint-tenants; they having the same unities of *interest*, *title* and *possession*. They may sue and be sued jointly for matters relating to their own lands; and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any

waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points.

1. They always claim by descent; whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands to hold to them and their heirs, they are not parceners, but joint-tenants; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.
2. There is no unity of *time* necessary to an estate in coparcenary. For if a man had two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or when both are dead, their two heirs are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title.
3. Parceners, though they have a *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in common.

4 KENT. COM., 367. By the *New York Revised Statutes*,¹ persons who take by descent under the statute, if there be more than one person entitled, take as tenants in common, in proportion to their respective rights; and it is only in very remote cases, which can scarcely ever arise, that the rules of

¹ 2 R. S., 753, sec. 17.

the common law doctrine of descent can apply. As estates descend in every State to all the children equally, there is no substantial difference left between coparceners and tenants in common. The title inherited by more persons than one, is, in some of the States, expressly declared to be tenancy in common, as in New York and New Jersey; and where it is not so declared the effect is the same; and the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States.

CHAPTER IV.

TENANCY BY ENTIRETIES.

2 BL. COM. 182. If an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

Id., 182, *n*. According to Mr. Preston's definition, tenancy by entireties is where husband and wife take an estate to themselves jointly by grant, or devise, or limitation of use made to them, *during coverture*, or by a grant, etc., which is *in fieri* at the time of the marriage, and completed by livery of seisin or attornment during the coverture. 1 Preston on Estates, 131. So if an estate be conveyed to husband and wife and a stranger, the husband and wife will only take one moiety between them, and the stranger will take the other moiety. Litt., s. 291; *Johnson v. Hart*, 6 W. & S. 319. This estate has several peculiarities. Says C. J. Montague, in Plowd. 58: "The husband has the entire use and the wife the entire use; for there are no moieties between husband and wife." Hence it is termed tenancy by entireties. The husband cannot forfeit or alien so as to sever the tenancy. They are seised *per tout* and not *per my*. Neither can sever the jointure, but the whole must accrue to the survivor. As the husband and wife cannot sue each other, they are not compellable to make partition. But where an estate is conveyed to a man and woman who are not married together, and who afterwards intermarry, as

they took originally by moieties, they will continue to hold by moieties after the marriage. There is nothing, therefore, in the relation of husband and wife which prevents them from being tenants in common. There are great opinions in favour of the position that husband and wife may by express words be made tenants in common by a gift to them during coverture. 2 Prest. on Abstr. 41; 1 Prest. on Estates, 132; 4 Kent, 363; 1 Reed's Blackst. 470. The case of *Stuckey v. Keefe's Exrs.*, 2 Casey, 397, holds a contrary doctrine. The acts of the legislatures of the various States abolishing joint-tenancies and converting them into tenancies in common have been construed not to extend to tenancies by entireties. *Shaw et al. v. Hearney et al.*, 5 Mass. 521; *Jackson v. Stevens*, 16 Johns. 110; *Den d. Hardenbergh v. Hardenbergh*, 5 Halst. 42; *Thornton v. Thornton*, 3 Rand. 179.—*Sharswood's note*.

WILLIAMS, REAL PROP. (17th ed.), 376. Tenancy by the entirety has been generally recognized in the United States as one of the common-law incidents of marriage, and still exists wherever it has not been expressly or impliedly abrogated by statute. In several States it has been held that the married women's acts have destroyed the common law unity of husband and wife, and that these acts, either alone or in connection with the statutes changing joint-tenancies into tenancies in common have practically abolished the estate by entirety.¹ For a like reason the Supreme Court of Iowa has decided that a conveyance to a husband and wife creates a tenancy in common, unless a contrary intention is expressed.² And in Kentucky and Massachusetts the same result is secured by an express statutory provision.³ In Connecticut and Ohio, where the doctrine of survivorship has

¹ See *Clark v. Clark*, 56 N. H. 105; *Walthall v. Gorce*, 36 Ala. 728; *Cooper v. Cooper*, 76 Ill. 57.

² *Hoffman v. Stigers*, 28 Iowa, 302.

³ Mass. Stat. of 1885, chap. 237, § 1; Gen. Stat. of Ky. 1888, chap. 52, art. 4, § 13.

never been recognized, tenancy by the entirety does not exist.¹ However, by the great weight of authority the common-law rule prevails, notwithstanding both the joint-tenancy statutes and the married women's acts. Such is the holding in the following States: Arkansas, Indiana, Kansas, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Pennsylvania and Vermont.² Even in these States the husband and wife may hold as tenants in common or as joint-tenants, if such an intention is clearly indicated in the instrument creating the estate.³ And the better opinion is that an absolute divorce terminates the estate by the entirety and reduces it to a tenancy in common.⁴—*Hutchins' note*.

¹ *Whittlesey v. Fuller*, 11 Conn. 337; *Sergeant v. Steinberger*, 2 Ohio, 305.

² See *Robinson v. Eagle*, 29 Ark. 202; *Dodge v. Kinzy*, 101 Ind. 102; *Baker v. Stewart*, 40 Kans. 442; *Marburg v. Cole*, 49 Md. 402; *Lewis' Appeal*, 85 Mich. 340; *McDuff v. Beauchamp*, 50 Miss. 531; *Garner v. Jones*, 52 Mo. 68; *Buttlar v. Rosenblath*, 42 N. J. Eq. 651; *Bertles v. Nunan*, 92 N. Y. 152; *Long v. Barnes*, 87 N. C. 329; *Diver v. Diver*, 56 Pa. St. 106; *Corinth v. Emery*, 63 Vt. 505. See, also, *Pray v. Stebbins*, 141 Mass. 219.

³ *Jooss v. Fey*, 129 N. Y. 17; *Miner v. Brown*, 133 N. Y. 308; *McDermott v. French*, 15 N. J. Eq. 78.

⁴ *Stelz v. Schreck*, 128 N. Y. 263; *Harrer v. Wallner*, 80 Ill. 197; *Ames v. Norman*, 4 Sneed (Tenn.), 683; *contra*, *Lewis' Appeal*, 85 Mich. 340.

BOOK III.

ESTATES IN LAND.

A. FEUDAL OR COMMON LAW ESTATES.

I. Estates of Freehold.

CHAPTER I.

THE FREEHOLD.

BRACTON, 207. I must then in the first place examine the different kinds of tenements. . . .

Now it is to be observed that a freehold tenement is that which a man holds to himself and his heirs in fee and in inheritance, or in fee alone, to him and his heirs. Land is also held as freehold when it is held only for life, or for an indefinite period, without any fixed limit of time, as for instance until such a thing happens or does not happen, as if it be said, "I give to such a one until I provide for him." But a tenement cannot be called a freehold which any one holds for a certain number of years, months, or days, though it be for a term of a hundred years, which exceeds the lives of men. Further, a tenement cannot be called a freehold which a man holds at the will of the lord and by favour,

which may be revoked in season or out of season, as when a man holds from year to year or from day to day.

2 BL. COM., 103. The next objects of our disquisitions are the nature and properties of estates. An *estate* in lands, tenements, and hereditaments, signifies such *interest* as the tenant has therein; so that if a man grants all his *estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby. It is called in Latin *status*, it signifying the condition, or circumstance, in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: *first*, with regard to the *quantity of interest* which the tenant has in the tenement; *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed; and, *thirdly*, with regard to the *number and connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man: to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

An estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton¹ to be "the *possession* of the soil by a freeman." And St. Germyn² tells us, that "the possession of the land is called in the law of England the franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony

¹ C. 32.

² Dr. & Stud. b. 2, d. 22.

called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or, in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton,¹ that where a freehold shall pass, it behooveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates. Estates of freehold (thus understood) are either estates *of inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute*, or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

LEAKE, LAND LAW, 43. Estates for life and estates of inheritance, being the estates admissible at common law in land of freehold tenure, are called *freehold estates*. An estate for life is sometimes called specially an estate of freehold, or *the freehold*, as distinguished from the inheritance, which in this sense includes the freehold. "The word freehold is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps in the old law it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of the feudatory, but varied as that varied."² Thus, the term freehold is used to denote the quantity or duration of estates as well as the tenure of the land.

¹ § 59.

² Butler's note to Co. Lit., 266, b.

WILLIAMS, REAL PROP. (17th ed.), 71. Let us here notice that the essential quality of ownership belongs equally to all freehold estates. For every freeholder, whether in fee simple, fee tail, for life or otherwise, has the right to maintain or recover possession of his land as against all the world. While he remains in possession he may exclude all others from his land; and if he be wrongfully ejected, he may recover possession of his land by peaceable entry or by action. And these rights have been secured to freeholders from the earliest days of our common law.

DIGBY, HIST. REAL PROP., App., § 2. The conception of an "estate" in lands is a peculiar characteristic of English law. It is regarded, as has been seen, as an interest falling short of complete ownership, but capable of differences in extent or duration. Thus where an interest is given to *A.* for life, and after his death to *B.* for life, and after his death to *C.* in fee, all these interests are regarded as *estates*, varying in duration or extent, and in the time of their coming into possession or enjoyment. The interest or right passes at once to the successive grantees. The grantor is regarded, not as parting with the whole ownership to *A.*, with a proviso that after *A.*'s death it is to go to *B.*, and after *B.*'s death to *C.*, but as carving out of his estate two smaller interests or estates, and then as having still the fee simple or inheritance to give away, the grant of which exhausts all the interest in the lands which he has to bestow, which yet does not amount to the complete ownership of the land. Thus the fee simple is regarded as the largest estate—the nearest approach to absolute ownership—which the law recognizes; an estate tail, an estate for life, an estate for years are regarded as smaller or shorter interests, which cannot exist without the fee simple at the same time residing in some person other than him who has the smaller or "particular" estate.

2 POLL. & MAIT., HIST. ENG. LAW, 10. We thus come upon a characteristic which, at all events for six centuries and perhaps for many centuries more, will be the most salient trait of our English land law. Proprietary rights in land are, we may say, projected upon the plane of time. The category of quantity, of duration, is applied to them. The life tenant's rights are a finite quantity; the fee tenant's rights are an infinite, or potentially infinite, quantity; we see a difference in respect of duration, and this is the one fundamental difference. In short, we are coming by a law of "estates in land." We have as yet, though not without a conscious effort, refrained from using that term, and this because, so far as we can see, it does not belong to the age of Bracton. On the other hand, so soon as we begin to get Year Books, we find it in use among lawyers. As already said, it is the Latin word *status*; an estate for life is, in the language of our records, *status ad terminum vite*, an estate in fee simple is *status in feodo simplici*; but a very curious twist has been given to that word. The process of contortion cannot at this moment be fully explained, since, unless we are mistaken, it is the outcome of a doctrine of possession; but when once it has been accomplished, our lawyers have found a term for which they have long been to seek, a term which will serve to bring the various proprietary rights in land under one category, that of duration. The estate for life is finite, *quia nihil certius morte*; the estate in fee is infinite, for a man may have an heir until the end of time. The estate for life is smaller than the estate in fee; it is infinitely smaller; so that if the tenant in fee breaks off and gives away a life estate, or twenty life estates, he still has a fee. Thus are established the first elements of that wonderful calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law.

CHAPTER II.

ESTATES IN FEE SIMPLE.

(a) *Pure Fee Simple.*

BRACON, 17. There is another division of gifts; that is to say, one kind is simple and absolute, another is conditional, another is restricted; and gifts may be made to one person or to several in succession. . . . A gift may be called simple and absolute when no condition or restriction is added, for that is said to be given absolutely when no terms are annexed to the gift. As if it be said, "I give such a one so much land in such a township in return for his homage and service, to have and to hold to the said — and his heirs of me and my heirs, rendering for the same by the year for himself and his heirs to me and my heirs so much, at such terms, in discharge of all service and secular customs and claims," so that the subject-matter of the gift be certain, and the services and customary rights which are due to the lord be ascertained, although other matters from which he is tacitly discharged may be uncertain, "and I and my heirs shall warrant, acquit, and defend such a one and his heirs against all persons for the service aforesaid:" and thus the donee acquires the subject of the gift by the title of a grant, and his heirs after him by the title of descent, and the heir acquires nothing from the grant made to his ancestor, because he is not enfeoffed with the donee.

LIT., § 1. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawfull

or pure. And so *feodum simplex* signifies a lawfull or pure inheritance. . . .

Co. Lit., 1, a. Though *fee*, in its general acceptation, signifies *land holden*, as distinguished from *land allodial*; yet in our law it is more frequently used in a particular sense, to denote the *quantity* of estate in land, which is always the sense of the word when we say that one is *tenant* or *seised in fee*. Therefore Littleton is not merely justified in writing that *fee is the same as inheritance*; for if in describing who is tenant in fee simple, he had explained the word otherwise, he would have misled the student.—*Hargrave's note I.*

Co. Lit., 1, b. "*Fee simple.*" *Fee* commeth of the French *fief*, i.e., *praedium beneficiarium*, and legally signifieth inheritance, as our author himselfe hereafter expoundeth it. And *simple* is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like, *Feodum est quod quis tenet ex quacunque causa sive sit tenementum, sive redditus, etc.* In *Domesday* it is called *feudum*. Of fee simple, it is commonly holden that there be three kinds, viz., fee simple absolute, fee simple conditionall, and fee simple qualified, or base fee. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz., simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations that defeat or abridge the fee. Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee.

LIT., § 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collaterall of the whole blood, how farre so ever he be from him in degree, may inherit and have the land as heire to him.

§ 11. And note, that a man cannot have a more large or greater estate of inheritance than fee simple.

Co. Lit., 18, *a*. This doth extend as well to fee simples conditional and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplex and greatnesse of the estate, and not of the perdurableness of the same. And he that hath a fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth betwene the quantity and quality of the estate. From this state in fee simple, estates in taile and all other particular estates are derived; and therefore worthily our author beginneth his First Booke with tenant in fee simple, for *à principalioribus seu dignioribus est inchoandum*.

2 Ld. RAYM., 1148. There were three sorts of estates of inheritance at common law: First, an absolute estate of inheritance to a man and his heirs: Secondly, a fee simple qualified as to the time of its duration; as an estate to a man and his heirs as long as J. S. has heirs of his body, or as long as *Bow church* stands, or as long as J. S. lives; for in these cases, though the estate shall descend to a man's heirs, yet they shall have it for no longer time than is contained in the respective limitations: Thirdly, a fee simple restrained as to what heirs shall inherit it. And this was called a fee simple conditional at common law.—*Per Powell, J., in Idle v. Cook*.

2 BL. COM., 104-107. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: generally, absolutely, and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allo-*

dium; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. . . .

This is the primary sense and acceptance of the word fee. But (as Sir Martin Wright very justly observes¹) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word fee in this its primary original sense, in contradistinction to *allodium*, or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A fee, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of simple annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee-conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*; of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to, and issue out of lands and houses, their owner hath no property, *dominium*, or demesne, in the thing itself, but hath only something derived out of it; re-

¹ Of Ten. 148.

sembling the *servitudes*, or services, of the civil law. The *dominium* or property is frequently in one man, while the appendage or service is in another. Thus Caius may be seised *as of fee* of a way leading over the land of which Titius is seised *in his demesne as of fee*.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in abeyance, that is (as the word signifies), in expectation, remembrance, and contemplation in law; there being no person *in esse* in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis*; it remains therefore in waiting or abeyance, during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance, as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor.

LEAKE, LAND LAW, 33. Such was the ultimate state of the fee simple or estate of inheritance at common law. It conferred the largest rights of use and enjoyment allowed by law, together with the largest power of alienation. A grant in fee simple left no estate or interest in the grantor, except the rights of seigniorial appertaining to the lord by the rules of tenure, among which was the right of escheat,

whereby the lord was entitled to resume the possession of the land upon the death of a tenant without heirs. But even these rights could not be reserved after the statute *Quia Emptores*; for by the effect of that statute the new grantee held directly of the same lord as the grantor held before.

Ultimately also the limitation "to the heirs," became the technical description of an estate of inheritance, which could not be legally expressed by any other means. A grant to a person simply without extending it in terms "to his heirs," and without any other limitation of the estate intended, continued to be construed according to its primitive force and effect, as conferring an estate only for the term of his life.

The grant "to *A.* and to his heirs," and a grant "to *A.* for life and after his decease to his heirs," according to the primitive force and effect of the expressions, were manifestly identical; inasmuch as they both conferred life estates upon *A.*, and upon the persons designated as his heirs in succession. They were still construed as identical, notwithstanding the change in the position and interest of the heir consequent upon the enlarged power of alienation in the ancestor; the limitation "to the heirs," in both cases, ceased to confer directly any estate upon the persons answering to that designation, and was referred to the estate of the ancestor, which, though expressed to be in the first place for life, it enlarged to an estate of inheritance, so that the heir took only by descent. This is the origin and simplest form of the rule in *Shelley's case*, an ancient rule of great importance in construing the limitations of estates, which will be noticed more fully hereafter.¹ At the common law all inheritances were fee simple in respect of the rights and powers of the tenant. In respect of duration they might be absolute or conditional, that is, determinable by some conditional limitation.

Id., 40. If a tenant in fee simple granted to another for a term of life, the alienation of the fee was partial only, in respect of duration of time, the residue being left in the

¹ See page 351, *post.*—ED.

grantor; and upon the determination of the estate for life, the possession reverted or returned to him or to his heirs; whence the residuary estate left by such conveyance was called a reversion, and the estate for life was called, in relation to the reversion, a *particular* or partial estate. A reversion is defined as "that estate which the lessor has after the possession is conveyed to and vested in another during a particular estate."¹

Id., 41. A tenant in fee simple might grant a particular estate, whether for life or in tail, to one person, and at the same time grant the residue or *remainder*, technically so-called, of the fee to another, leaving no reversion in himself. A remainder is defined to be "a residue or remnant of an estate in land, expectant upon a particular estate created together with the same at one time."² So he might grant several particular estates successively in remainder, leaving the reversion in himself, or at the same time granting away the ultimate remainder in fee without leaving any reversion.

The grant of an estate in fee simple exhausted the power of the grantor; no reversion was left nor could any remainder be limited after such estate. On the determination of a fee simple for want of heirs, *per defectum sanguinis*, the land fell back to the lord by right of escheat, which was not an estate in the land, strictly so-called, but a right incident to the seignior. A fee simple conditional at common law was equally extensive in this respect, and left no reversion or residue at the disposal of the grantor. "One fee-simple cannot depend upon another by the grant of the party; as if lands be given to A., so long as B. hath heirs of his body, the remainder over in fee, the remainder is void."³

N. Y. REAL PROP. LAW, § 21. An estate of inheritance continues to be termed a fee simple, or fee, and, when not

¹ Plowd. 196, and see *ib.* 151.

² Co. Lit. 49, a; 143, a.

³ Co. Lit. 18, a; 10 Co. 97, b, *Seymour's Case*.

defeasible or conditional, a fee simple absolute, or an absolute fee.

(b) *Limited Fee Simple.*

2 BL. COM., 109. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to *A.* and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of *A.* cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

SANDERS, USES, 200. Before the statute *Quia Emptores* (18 Edw. I.), an estate might have been granted to *A. B.* and his heirs, so long as *C. D.* and his issue should live, or so long as *C. D.* and his heirs should be tenants of the manor of Dale; and upon *C. D.*'s ceasing to have issue, or of being tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry; but as a principle of tenure, in the nature of an *escheat* upon the death of a tenant in fee simple without heirs general. But the statute of *Quia Emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion, remaining in the donor after an estate in fee granted by him. This conclusion directly fol-

lows from the doctrine of tenures, and the effect of the statute of *Quia Emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138 contains an accurate exposition of the law upon this subject: "If land be given to *A.* and his heirs, *so long as J. S. has heirs of his body*, the donee has fee, and may alien it; 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the s. c. is put and held as before; and that there if the land be given to one and his heirs, *so long as J. S. and his heirs* shall enjoy the manor of *D.*, those words (*so long*) are entirely void and idle, and do not abridge the estate."

LEAKE, LAND LAW, 35. A fee limited to a person and "to the heirs of his body" or "to the heirs male of his body," or in other form of restricted inheritance, was a fee simple conditional at common law. It was determinable by failure of the line of issue designated to succeed, and the land reverted in possession to the grantor or his heirs. But the restriction upon the duration of the fee did not, at common law, otherwise affect the rights and powers of the tenant; and in respect of these it remained a fee simple. So long as the fee lasted the tenant for the time being had all such powers, including the power of alienation, as were the inseparable incidents of an estate of inheritance. Only it was adjudged to be a necessary condition of the full effect of his alienation, so as to bar not only his issue, but also the possibility of reverting to the grantor, that he should have heritable issue—"the gift to one and to the heirs of his body was construed for the purpose of alienation, to be the same as a gift to him and to his heirs, if he had heirs of his body."¹

Other ancient instances are cited of fees simple conditional, as: a fee limited to *A.* and to his heirs for so long as the Church of St. Paul shall stand; to *A.* and to his heirs,

¹ Plowden, 235, and see *ib.* 245, 247, 250; Co. Lit., 19, a.

tenants of the manor of Dale; to *A.* and to his heirs, so long as *A.* or *B.* has heirs of his body.

But the statute *Quia Emptores* by preventing the creation of any tenure between the grantor and grantee, where the fee was granted subsequently to the statute, put an end to any right of reverter upon such grants. Before the statute, upon the determination of the fee by the conditional limitation, the land reverted to the grantor by way of *escheat*; for, the grant having conveyed the whole fee, there was no reversionary *estate* left in the grantor to entitle him to the possession. But under such a grant made after the statute there could be no seignory created to which an *escheat* would be incident; and *escheat* to the superior lord could not occur until failure of the original tenure, the terms of which were not altered by the alienation of the tenant.

DIGBY, HIST. REAL PROP., Ch. V., § 3 (2). It follows, from the very definition of a remainder above given,¹ that so soon as the fee simple is parted with, the donor has given away all that he has to grant, and can make no ulterior disposition. A remainder limited to take effect after a fee simple estate is simply void. Nor is the case altered when, as has been pointed out above, the estate in fee simple is liable to be terminated by the happening of some specified event. For instance, if an estate be granted to *A.* and his heirs so long as he continues unmarried, this estate will come to an end upon *A.*'s marriage; but the rule that a remainder cannot be limited after a fee simple would, *at common law*, prevent the settlor from making any ulterior gift, such as "and from and after the marriage of *A.* to *B.* and his heirs."

GRAY, PERPETUITIES, § 32. . . . A fee simple subject to a conditional limitation, that is, to a springing or shifting use or executory devise, is sometimes called a qualified or determinable fee; but this is not technically exact. A qualified fee is one subject to a special limitation; that is, a limitation which marks the original bounds of the estate, and after

¹ See page 326, *post.*—ED.

which, in case of a fee, no other estate can be granted. A conditional limitation, as the term is commonly used, cuts off the first estate and introduces another. An estate to *A.* and his heirs, tenants of the Manor of Dale, is an instance of a qualified fee. An estate to *A.* and his heirs, but if he dies unmarried then to *B.* and his heirs, is a fee simple subject to a conditional limitation. Qualified fees were good at common law, but were done away with by the statute *Quia Emptores*. Conditional limitations were not good at the common law; they were first introduced by the statutes of Uses and of Wills.

§ 33. The effect, however, of the statute *Quia Emptores* in putting an end to qualified fees has been often overlooked, though, as has just been said, no such fee has been actually sustained in England by decision since the statute.

§ 36. Mr. Sanders was the first author to distinctly recognize, or at any rate to distinctly state, that the statute *Quia Emptores* put an end to qualified fees. He says that his remarks are taken from an opinion of his own, "which was subsequently well considered by two gentlemen of eminence at the bar, and signed by them." The Commissioners on Real Property (Sir John Campbell and Messrs. Tinney, Duval, Hodgson, Duckworth, Brodie, and Tyrrell, all, except the chairman, among the most eminent real-property lawyers of their time), in their third Report, made in 1832, speaking of a devise of an estate to *A. B.* and his heirs, on condition that they use the name and arms of *C. D.*, say: "Some have thought that the will passed a fee simple, determinable upon the non-performance of the condition; but it was not a determinable fee in the proper sense of the expression, if (as is perhaps the true state of the law on this subject) a determinable fee was an estate before the statute of *Quia Emptores*, as upon a grant to *A. B.* and his heirs, so long as *I. S.* and his issue shall live, in which case the donor retained, in the nature of a right to an escheat, a reversionary interest which arose on the death of *I. S.* and the failure of his issue. But the statute of *Quia Emptores*,

by destroying the tenure between the donor and donee, in cases where the fee was granted subsequently to the statute, put an end to any right of reverter on such grants;" and reference is made to the passage in Anderson, above quoted. The most careful recent writers have adopted this view.

§ 38. In Pennsylvania (if *Wallace v. Harmstad* is unsound) and in South Carolina tenure exists and the statute *Quia Emptores* is not in force.¹ In these States, therefore, apart from the question of remoteness, qualified fees may be valid. In *Scheetz v. Fitzwater*,² *Penn. R. R. Co. v. Parke*,³ and *Henderson v. Hunter*,⁴ it was assumed that fees simple determinable might be created.

§ 39. In the other States there is either no tenure at all, or, where there is tenure, there is no good reason to doubt the existence of the statute *Quia Emptores*. In neither case can there be any possibility of reverter. As in England, so in the United States, there are, however, several cases which speak of such interests as possible.

4 KENT COM., 9-11. *A qualified, base, or determinable fee* (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. A limitation to a man and his heirs, so long as *A.* shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of *B.*; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualification annexed to it is at an end. If the event marked out as the boundary to the time of the continuance of the estate

¹ See pages 139, 140, *supra*.—ED. ² 5 Pa. 126. ³ 42 Pa. 31. ⁴ 59 Pa. 335.

becomes impossible, as by the death of *B.* before his marriage, the estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time, the estate is in the grantee, subject only to a possibility of reverter in the grantor. It is the uncertainty of the event and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold. All fees liable to be defeated by an executory devise are determinable fees, and continue descendible inheritances until they are discharged from the determinable quality annexed to them, either by the happening of the event, or by a release. These qualified or determinable fees are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the title. A tenant in tail may, by a bargain and sale, lease and release, or covenant to stand seised, create a base fee, which will not determine until the issue in tail enters.

If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that *nemo potest plus juris in alium transferre quam ipse habet*. Within that rule, the proprietor of a qualified fee has the same rights and privileges over the estate as if he were a tenant in fee simple; all the estate is in the feoffee, notwithstanding the qualification, and no remainder can be limited over, nor any reversion expectant thereon, other than the possibility of a reverter when the estate determines, or the qualification ceases.¹

¹ 10 Co. 97, *b.* Preston on Estates, vol. i. 484. According to Lord Ch. J. Vaughan, the reverter in this case is a *quasi* reversion, and he did not see why a remainder might not be granted out of such a qualified fee. *Gardner v. Sheldon*, Vaughan, 269. But the rule is probably otherwise, and on a fee simple conditional at common law, a remainder could not be created, for the fee was the whole estate. There was only a possibility, or right of reverter, left in the donor, and that was not an actual estate (Lee, Ch. J., in *Martin v. Strachan*, 5 Term Rep. 107, note); and yet Mr. Preston (on Estates, vol. ii. 353) concludes that limitations of remainders, after qualified or limited estates of inheritance, were in use at common law.

155 MASS. REP., 171. The grant to the plaintiff was to have and to hold, etc., "so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue as long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Wal-singham's Case*, 2 Plowd. 557, is "as long as the church of St. Paul shall stand." *Brattle Square Church v. Grant*, 3 Gray, 142, 147. . . . A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *Quia Emptores*. (See Gray, Rule against Perpetuities, secs. 31-40, where the question is discussed and authorities are cited.) We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this coun-

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try, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159, 168; *Leonard v. Burr*, 18 N. Y., 96. . . .

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark. This is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of land upon a condition subsequent. The exact nature and incidents of this right need not now be discussed, but it represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines.—*Per* Allen, J., in *Universalist Society v. Boland* (1892).

18 N. Y. REP., 96. The devise to Bailey is, by the terms of it, "until Gloversville shall be incorporated as a village." These words are part of the devise itself. The use of the land, which imports the land, is given to him until the happening of that event. The event was contingent when the will was made, and at the death of the testator. Had the will stopped here, in respect to a disposition of this land, no one would doubt that the estate of Bailey would have been limited in duration to the contingency mentioned. He would have taken a base or qualified fee; an estate which might have continued forever, but which would have been liable to determination by the occurring of the contingency. The qualification to the devise would have created what is termed in the books a collateral limitation, making the estate determinable upon an event "collateral to the time of its continuance." 4 Kent's Com., 129; Fearne, ed. of 1826, 12 to 15, and notes. Among the instances of collateral limitations are, to a man and his heirs, tenants of the manor of Dale; or to a woman during widowhood; or to C. till the return of B. from Rome; or until B. shall have paid him twenty pounds. 4 Kent, 129; 1 Shep. Touch., 125. . . . In respect to such limitations, the rule is, that "the estate

will determine as soon as the event arises, and it never can be revived." 4 Kent, 129, and cases cited.—*Per* Strong, J., in *Leonard v. Burr* (1858).

MASS. PUB. STAT., 121, § 1. When land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof upon the decease of the owner, the right of dower therein, the estate in lieu of dower, the sale thereof by executors, administrators, guardians, or trustees, the levying of executions thereon, and the redemption thereof when mortgaged or when taken on execution; and whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder for all purposes.

(c) *Creation of Fee Simple.*

LIT., § 1. . . . For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heires; for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold forever; or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lacke these words (his heires), which words onely make an estate of inheritance in all feoffments and grants.

Co. LIT., 8, b. And it is to be observed, that every word of Littleton is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take

nothing. Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him or his heires, he hath but an estate for life, for the uncertaintie (*ses, suis*). If a man give land unto two, To have and to hold to them two *et haeredibus*, omitting *suis*, they have but an estate for life, for the uncertainty; whereof more hereafter in this Section. But it is said, if land be given to one man *et haeredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton. . . . Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; for if lands be given to a sole body politique or corporate, (as to a bishop, parson, vicar, master of an hospital, etc.,) there to give him an estate of inheritance, in his politique or corporate capacitie, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance; for as an heire doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to *I. S.* and his successors, this createth no fee simple in him; for Littleton, speaking of naturall persons, saith that these words (his heires) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).

9, *a.* These words (his heires) doe not onely extend to his immediate heires, but to his heires remote and most remote, borne and to be borne, *sub quibus vocabulis (haeredibus suis) omnes haeredes propinqui comprehenduntur, et remoti, nati, et nascituri.* And *haeredum appellatione veniunt haeredes haeredum in infinitum.* And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

9, *b.* And here it is to be observed (that I may speak once for all), that every period of our author in all his three books containes matter of excellent learning, necessarily to

be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants necessarily implieth that this rule extendeth not,

First, to *last wills and testaments*; for thereby, as he himselfe after saith, an estate of inheritance may passe without these words (*his heires*). As if a man devise twenty acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor, albeit it be not the value of the land. So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. If a man devise land to a man *et sanguini suo*, that is a fee simple, but if it be *semini suo*, it is an estate taile.

Secondly, that it extendeth not to a *fine sur conusans de droit come ceo il ad de son done*, by which a fee also may passe without this word (*heires*) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of waies. First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (*heirs*), by *Littleton's* own opinion they have a fee simple, as appeareth hereafter. 2. By release, when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, etc., release to the tenant of the land generally all his right, etc., hereby the seigniory, rent, etc., are extinguished for ever, without these words (*heires*). 3. When a bare right is released, as when the disseisee release to the disseisor all his right, he need not

(saith our author in another place) speake of his heires. But of all these and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. *A.* seised of land suffereth *B.* to recover the land against him by a common recovery, where the judgment is, *quod praedictus B., recuperet versus praed A. tenementa praedicta cum pertin;* yet *B.* recovereth a fee-simple without this word (heires); for regularly every recoveror recovereth a fee simple. 5. Nor to a *creation of nobilitie* by writ, for when a man is called to the upper house of Parliament by writ, he is a baron and hath inheritance therein without the word (heires). . . .

10, *a.* And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that enure by way of enlargement of estates, warranties, bargaine and sales by deed indented and inrolled, and the like, in which this word (heires) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus*. And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himselfe in another place¹ explaneth it, saying, *et memorandum que en tous autres (tiels) cases, coment que ne sont icy expressment moves et specifes, si sont en semblable reason sont en semblable ley.*

2 BL. COM., 107-109. The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life. This very great nicety about the insertion of the word "heirs," in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which we may remember it was required that the form of the donation

¹ Sec. 301.

should be punctually pursued; or that, as Cragg expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions.

For, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided; but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in a grant to a bishop or other sole spiritual

corporation, in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors," (as the word "successors" supplies the place of "heirs,") *ex vi termini*; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

LEAKE, LAND LAW, 192. By the Wills Act, 1 Vict., c. 26, s. 28, which does not extend to any will made before 1st January, 1838, it is enacted "that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will."

4 KENT, 5-8. The word heirs is, at common law, necessary to be used, if the estate is to be created by deed. The limitation to the heirs must be made in direct terms, or by immediate reference, and no substituted words of perpetuity, except in special cases, will be allowed to supply their place, or make an estate of inheritance in feoffments and grants. The location of the word in any particular part of the grant is not essential; for a grant of a rent to A., and that he and his heirs should distrain for it, will pass a fee. The general rule is applicable to all conveyances governed by the rules of the common law; for though prior to

the Statute of Uses, the fee, in the view of a court of chancery, passed by reason of the consideration, in a bargain and sale, or covenant to stand seised to uses, without any express limitation to the heirs; yet, when uses were by statute transferred into possession, and became legal estates, they were subjected to the scrupulous and technical rules of the courts of the law. The example at law was followed by the courts of equity, and the same legal construction applied by them to a conveyance to uses. If a man purchases lands to himself for ever, or to him and his assigns for ever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word heirs. The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, *stricti juris*, made a consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs.

But the rule has for a long time been controlled by a more liberal policy, and it is counteracted in practice by other rules, equally artificial in their nature, and technical in their application. . . . It is likewise understood that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee.

Thus stands the law of the land, without the aid of legislative provision. But in this country, the statute law of some of the States has abolished the inflexible rule of the common law, which had long survived the reason of its introduction, and has rendered the insertion of the word heirs no longer necessary. In Virginia, Kentucky, Mississippi, Missouri, Alabama, and New York, the word heirs, or other words of inheritance, are no longer requisite, to create or convey an estate in fee; and every grant or devise of real

estate made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms or by necessary implication. The statute of New York also adds, for greater caution, a declaratory provision, that in the construction of every instrument creating or conveying any estate or interest in land, it shall be the duty of the courts to carry into effect the intention of the parties, so far as such intention can be collected from the whole instrument, and is consistent with the rules of law. Some of the other States, as New Jersey, North Carolina, and Tennessee, have confined the provision to wills, and left deeds to stand upon the settled rules and construction of the common law. They have declared by statute that a devise of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a lesser estate was intended.

30 N. J. LAW REP., 505. To adopt as a settled rule of interpretation that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty in getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule, that the grantor of the deed must express his intent by the use of the necessary words of conveyance, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here? . . .

Neither the researches of the learned judge who delivered the opinion of the Supreme Court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England or in any State of this Union abiding by the common law, where in a conveyance by deed the word children has been held to be equivalent to heirs. That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the Supreme Court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis*; to maintain the great rules of property, to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been than what it is. I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.—*Per Whelpley, J., in Adams v. Ross* (1860).

54 N. H. REP., 242. It is said to be a rule of the common law that without the word "heirs" a fee simple in land cannot pass by deed; and that this rule is so absolute and unyielding, that, no matter how clearly the intention of the grantor to convey a fee may be stated in the deed, such intention can be of no avail without that word. Washb. R. P., Bk. I., Chap. III., sec. 53, and authorities in notes. *A priori* we should expect to find a rule which in its practical application brings about results so anomalous and absurd, but which is, nevertheless, enforced with such remorseless rigor by the courts, upheld by reasons very plain and very imperative. Naturally we should also expect that the books, which are full of cases where its application has produced palpable injustice, more or less aggravated according to circum-

stances, would also be filled with strong and conclusive reasons in its support. On the contrary, what does appear? I venture to affirm that since the revolution by which the house of Stuart was finally excluded from the British throne, when most of the shackles which feudalism had riveted upon the tenure of lands throughout the kingdom were removed, not a reason, nor the semblance of a reason, growing out of the condition and wants of society, the progress of civilization, the exigencies of trade, or the analogies of the law can be found in its support in any country or State where the common law has been used. . . .

To comprehend fully the reasons which gave birth to this rule, we ought to recall not only the nature of the feudal tenures of land in England, but the history of the origin and development of the system itself, which before the close of the eleventh century had succeeded, mainly by conquest and force, in vesting the ultimate ownership of nearly all the lands in England, as well as on the continent of Europe, in the feudal lords, and parcelling them out among a few military chieftains or leaders of bands of predatory barbarians. . . .

These extracts are enough to show that the word "heirs," when first introduced into charters and feoffments, was a word of very great importance. It enlarged the right of the vassal from one held either at the will of the lord, or for his own life, to a permanent and hereditary interest. It signified an undertaking by the lord that he would accept the heir as his vassal, and that all the rights and obligations growing out of that relation should be extended to him. It was, in effect, simply a stipulation for a renewal of the lease upon the same terms with the heir of the first lessee. They also show to some extent the nature of the institutions and conditions of society in which the rule we are speaking of originated and to which it was applicable, and strongly present the contrast between those institutions and our own. . . .

When the fetters which feudalism had fastened upon the

tenure of lands in England fell off, every reason on which this rule had rested fell with them. Why should the rule itself be retained? Lord Coke says: "*Cessante ratione legis, cessat ipsa lex.*" Coke, Litt., 70, *b*. And that has come to be—indeed, it was then—one of the most familiar maxims of the law. . . .

In the nature of things the word [heirs] is no more necessary to the valid conveyance of land than to the valid conveyance of a horse. Its use was necessary in the scheme of a semi-barbarous institution, a vast engine of slavery and oppression, an instrument of violence and disorder, which had no better security for its continued existence than superiority of brute force, and which was swept away upon the dawn of a better civilization more than five hundred years ago. Why is its use still required in one class of instruments and not in the other, when both have the same object in view, namely, the conveyance of land?

I have not found any answer to this inquiry. The legal signification and effect of the word as used in our deeds of bargain and sale are purely technical. Strictly speaking, there is no one in existence at the time of the grant to answer the description. *Nemo est haeres viventis*. Those who may become the heirs of the grantee take not the slightest present interest by virtue of the word. The conveyance vests the absolute and unlimited ownership in the grantee; the word imposes no restraint on his power of alienation. Nevertheless it has a settled and well-understood meaning as thus used, and, as a legal term, is very convenient and useful to show that the estate granted is a fee. It could not now be safely omitted without using some other form of expression showing with legal accuracy the intention and contract of the parties.

Of course it will not be omitted by any conveyancer or other person who knows the significance it has acquired. But when a case arises where the intention of the grantor to convey a fee-simple is clearly shown by other words in the deed, we think the court have no power to say a fee shall

not pass because he has not, in addition, inserted this technical word, using it in a sense entirely distinct and different from its usual and common import. Our conclusion is that the rule, which would defeat the obvious intention and destroy the plainly expressed contract of the parties in the present case, is not adapted to our institutions or the condition of things in this State; that it never became part of the law of the State, and, therefore, that this instrument conveys to the lessees a perpetual right to take and use the water upon the terms and conditions specified, which right may pass to their heirs and assigns as a fee.—*Per Ladd, J., in Cole v. Lake Co. (1874).*

FINCH, CASES, PROP. IN LAND, 489. It would seem that technical words of limitation are still required to pass a fee in Maine, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, South Carolina, Florida, Ohio and Wyoming.—*Finch's note.*

N. Y. REAL PROP. LAW, § 205. Every instrument creating, transferring, assigning, or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.

§ 210. A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom.

CHAPTER III.

ESTATES IN FEE TAIL.

(a) *Conditional Fee.*

BRACON, 17. Likewise as the class of heirs may be enlarged, . . . so can it be restricted by the limitations expressed in the gift, and in that case the heirs general do not succeed. For the limitations fix the legal effect of the gift, and the limitations of the gift must be abided by contrary to common right, and contrary to the general law, because such limitations, when agreed on, override the general law, as if the words are, "I give such a one so much land with the appurtenances in *N.* to have and to hold to him and his heirs whom he may have begotten of his body by his wedded wife." . . . In which case, since a restricted class of heirs is mentioned in the gift, it may be seen that the descent is only to the common heirs of husband and wife according to the limitations expressed in the gift, all other heirs of the husband being altogether excluded from the succession, because such was the intention of the donor. Hence it is that if heirs of this kind have been begotten, they alone are called to the succession, and if one who is enfeoffed in this manner has proceeded to enfeoff any one else of the land, this feoffment holds good, and the heirs of the feoffer are bound to warranty, since they can claim nothing except by succession and descent from their ancestors, although some think that the heirs themselves have been enfeoffed together with their parents, which is not true. But if a feoffee to himself and the heirs of his body have no such heirs, the land will revert to the donor by an implied condition, even if there be no mention in the

deed of gift of such reversion, or if there be such express mention; and this will be the case, too, if heirs have at any time come into existence and have failed. But in the first case, where no heir has come into existence, the donee will always hold the property given as an estate for life and not as a fee. Also in the second case, until an heir has come into existence the estate is an estate for life; when, however, an heir has come into existence the life estate passes into a fee, and when there ceases to be any heir the fee also comes to an end and passes into an estate for life, and as a consequence such a gift will never support a claim of dower unless it be an absolute gift, because it is never the practice to make express mention of the reversion. . . .

PLOWD., 245. And at the common Law there was no Estate of Inheritance but what was Fee-simple. But these Estates in Fee-simple were of two Sorts, the one absolute, and the other conditional, as hath been said. And the Fee-simple conditional was, where Land was given to a Man [and] to the Heirs of his Body begotten, and herein the Abuse was after Issue had rather than before Issue had. For before Issue had, if he had aliened, this should not have bound the Issues had afterwards, nor the Donor if there had been no Issue, for until Issue had the Donee had no Power to alien, though he had after Issue. For when the Gift was to one and to the Heirs of his Body, they took it that he could not lawfully alien until he had such Heirs, and that if he did alien, the Donor (although he could not enter presently) after the Death of the Donee, if he had no Issue, might have a *Formedon* in Reverter. For the Gift being to one and to the Heirs of his Body, they adjudged it not to be a full Fee-simple until he had Heirs of his Body, for when it was uncertain whether he should have an Heir of his Body or not, they did not take him to have a full inheritance. . . . But after Issue had such Donee at the common Law had Power to alien, and thereby to bar the Issues and the Donor, for by having Issue the Condition was performed, and his

Inheritance was made more full.—*Per* Brown, J., in *Willion v. Berkley* (1562).

Co. Lit., 19, a. Before which statute of *Donis Conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; for if he had died without issue male, the donor should have entered as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien; Secondly, to forfeit; Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue; for if the donee had issue and died, and the land had descended to his issue, yet if that issue had dyed (without any alienation made) without issue, his collaterall heire should not have inherited, because he was not within the forme of the gift, *viz.*, heire of the body of the donee. . . .

If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor.

DIGBY, HIST. REAL PROP., Ch. IV., § 3. The technical expression, "conditional gift," has been already explained in commenting on the passage of Bracton given above. It has been already seen that in Bracton's time a gift accompanied by words of procreation, as, for instance, to a man and the heirs of his body, or to a man and his wife and the heirs of their bodies, and similar expressions, was held to be an estate of inheritance conditional on issue being born; until this event happened the interest was in effect merely an estate for life. It was, strictly speaking, an estate descendible to the class of heirs mentioned in the gift, if such

there should be. If, therefore, a donee, holding to himself and the heirs of his body, made an alienation of his land, his heirs, Bracton tells us, would be bound to warranty, that is, to uphold the gift, inasmuch as they could only claim by descent from their ancestor and take nothing by the original gift. These estates, therefore, upon the happening of the condition, differed from ordinary estates in fee simple only in the restricted character of their devolution to the class of heirs named in the gift. So soon as the condition was performed by the birth of issue, the tenant could alienate and convey an estate in fee simple. So if the donee of such an estate committed treason, the fee simple would, after birth of issue, be forfeited. This would not have been the case if the descent had been secured by virtue of the form of the gift. The power of alienating the whole would as a matter of course involve the power of alienating particular rights over the land, such as granting a rent payable out of it, or charging it with debts so as to bind successors in title. If, however, the land was not alienated, it would descend not according to the ordinary rules affecting inheritances, but according to the mode expressed in the gift. It can hardly be doubted that this strained construction was put upon such gifts in order to favour the practice of alienation, which was dear to the common lawyers and to the great mass of landowners, though abhorrent to the *domini capitales*.

It was to restrain the practice of alienating these conditional estates, and so at once to prevent the lord losing the benefit of escheat upon failure of the descendants of his feoffee, and to protect the interests of the heir, that the Statute *De Donis Conditionalibus* was passed. In order to effect this object it was provided that such an alienation should not defeat the devolution of the estate to the heir, but that in the event of the tenant of a conditional estate alienating, the heir on the decease of his ancestor might recover the estate from the feoffee, or any person claiming under him. It was further provided that where the tenant

had made a feoffment in fee, having had issue born, who had subsequently died, the original donor (or lord) might recover the land from the feoffee by the same form of remedy as he might have employed before the Statute to recover land which his tenant had conveyed away for an estate in fee without having had issue born.

STAT. WESTM. II. (13 EDW. I., 1285), c. 1. *De Donis Conditionalibus*.—First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift; and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form of the gift: wherefore our lord the King, perceiving how necessary and expedient it should be

to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. . . . And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

DIGBY, HIST. REAL PROP., Ch. IV., § 3. The effect of this Statute was to create a new species of estates of inheritance, which, except under certain special circumstances, could not be alienated so as to defeat the expectant interest of the issue specified in the gift, or postpone the reversion of the lord. There was, it is true, no direct provision restraining the grant in fee simple of such estates. No forfeiture or other immediate penalty would be incurred either by feoffor or feoffee. But inasmuch as the feoffor could only give a title valid against himself and not as against his issue or his lord after his own decease, the fee simple which he would convey to the feoffee would be insecure and pre-

carious, and liable to be defeated by the issue of the feoffor, or after failure of the issue, by the lord or original donor. An estate in fee which was thus liable to be defeated was called in later times a *base fee*.

The provision of the Statute that the will of the donor as expressed in the charter should for the future be observed was held by the tribunals to have the following interpretation: Wherever lands were granted by words which before the Statute would have created a conditional gift of one of the kind specified in the Statute, such a gift would now pass an estate of less extent than a fee simple. Thus, suppose *A.*, tenant in fee simple, made a grant to *B.* and the heirs male of his body. This limitation, which before the Statute would have been a fee simple conditional on *B.* having a son born, was now held to convey a special kind of estate of inheritance, namely an estate descendible only to heirs male. This was considered to be a smaller estate than a fee simple, which was capable of descending to heirs general, *i.e.*, collateral as well as lineal. This secondary species of fee has ever since this Statute been designated an *estate tail*, *feudum talliatum*, being a portion of an estate *taillé*—cut off—from the fee. Hence it came to be established that when *A.*, tenant in fee simple, had made the grant above mentioned he had not granted away all that he had to grant, some interest or estate was left in him still, the fee simple in fact was not gone; but inasmuch as the right of present enjoyment had been parted with for an estate which would last as long as *B.* and his male line continued, the fee simple was what was called an estate in reversion, as opposed to one in possession. *B.*'s estate was called an estate in *fee tail*, an estate cut off from the larger estate; and in technical language the effect of the above grant would be, that *B.* would have an estate in fee tail in possession, *A.* would have an estate in fee simple in reversion expectant upon the determination of the estate tail. The difference between an *estate* in reversion and a mere *possibility* should be noticed. After the Statute, and the judicial interpretation of it above

explained, *A.* would have an estate or definite interest known to the law, which he could if he pleased convey by the proper mode and vest in another person. Before the Statute he would merely have had the possibility or chance of the fee simple escheating to him on failure of *B.*'s male issue; and this is not a present disposable right known to the law, but is merely a possibility of obtaining such a right. In consequence of the recognition of this new estate or interest in lands—the estate tail—it became possible to create interests in lands of a much more complicated character than before. When a person had granted away the fee simple he had disposed of all that he had to grant, and could make no further valid disposition of his property. But now that an interest was recognized intermediate between the estate for life and the estate in fee simple, it became possible to grant lands as follows—to *A.* for life, and after the expiration of that interest (or, more shortly, remainder) to *B.* and the heirs of his body, remainder to *C.* and his heirs. Here the ultimate gift to *C.*, though passing to him at once an estate, would be merely an estate in expectancy, that is, the enjoyment of it would be postponed, not only till *A.*'s death, but also till after the failure of *B.*'s lineal descendants.

(b) *Nature of Fee Tail.*

PLOWD., 251. And where an Estate to one and to the Heirs of his Body was a Fee simple before the Statute, now since the Statute it is taken in 12 Ed. 4, that he has but a Fee-tail, and this is included in the Statute, altho' it is not expressed, as the Book says. And herein the Book says true, for when the Statute restrained the Donee from aliening the Fee-simple, or from doing other Acts, which he that has a Fee-simple may do, it was presently taken that the Fee was not in him, for it would be idle to adjudge it in him, when he could not do any Thing with it, and therefore it was taken, by Collection and Implication of the Act, that

the Fee-simple continued in the Donor. So that he has one Inheritance, *viz.*, a Fee-simple, and the Donee has another Inheritance of an inferior Degree, *viz.*, a Fee-tail. And the Name of the Estate was taken from the Certainty of the Limitation of the Inheritance, as *Littleton* says, for he says, *Talliare idem est quod in certitudinem ponere*, and because in the Gift it is expressed of what Body the Heirs which shall inherit shall issue, for this Reason he took it that it was called a *Tail*, or rather it might have the name of the *French* word (*tailer*), which is *to cut*, for to dock Wood is to cut Wood, and because the Estate is docked, or cut off (for before it was a Fee-simple, and now the Fee is cut off from it, and the Estate thereby is docked, cut off, or made less), it may well be called an Estate-tail, *viz.*, an Estate docked, cut off, or abridged; and immediately upon the making of the Act it had this Name given it. And it was also taken that the Reversion in Fee was left in the Donor, for in the same Session of Parliament and in the Act which is the *fourth* Chapter after, *viz.*, in the Chapter which gives the *quod et deforceat*, it is recited, that if one had lost his Land by Default, he had no other writ to recover the Land again but a Writ of Right, which did not serve for them who had not a Fee-simple, as *Tenants for Term of Life, in Free-marriage, or in Fee-tail, in which Cases a Reversion is reserved*, there it is provided that such shall have a *quod ei deforceat*. So that it is there called a *Fee-tail*, and that in such Case a *Reversion is reserved*. Wherefore they of the same Parliament immediately took it that the Estate was divided, and that the Donor had the Fee-simple, and the Donee a Fee-tail, and this Construction was gathered from the Will of the Donor. For it is to be presumed that he who would not have the Donee to do any Act that Tenant in Fee-simple might do, did not chuse that he should have a Fee-simple Estate. So that by the Implication of the Act, the Estate which was a Fee-simple conditional is divided, and the Fee continues always in the Donor, and the Donee has an Estate tail. And therefore the Estate of the Donee is

altered for before the Statute the Issue should have had an Assize of *Mortdancestor*, but now he shall not; and before it should have escheated for Felony after Issue had, but now it shall not; and before the Donee should forfeit it for Treason, and now, as appears in 7 H., 4, he shall not; and before the Donee might charge the Land, and the Issue should have held it charged, but now he cannot, for it is not the same Estate that it was before, nor in the same Degree.—*Per* Dyer, Ch. J., in *Willion v. Berkley* (1562).

LIT., § 13. Tenant in fee taile is by force of the statute of W. 2, cap. 1, for before the said statute, all inheritances were fee simple, for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall and tenant in taile speciall.

§ 14. Tenant in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife (if he hath many wives, and by every of them have issue), yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

§ 15. In the same manner it is, where lands or tenements are given to a woman, and to the heires of her bodie; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

§ 16. Tenant in taile speciall is where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendred between them two. And it is called especiall taile, because if the wife die, and he taketh another wife, and have issue, the issue of the sec-

ond wife shall not inherite by force of this gift, nor also the issue of the second husband, if the first husband die.

§ 17. In the same manner it is, where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmariage, the which gift hath an enheritance by these words (frankmariage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betweene them two begotten. And this is called especial taile, because the issue of the second wife may not inherit.

§ 18. And note, that this word (*Talliare*) is the same as to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall indure, it is called in Latine, *feodum talliatum*, i.e., *haereditas in quandam certitudinem limitata*. For if tenant in generall taile dieth without issue, the donor or his heires may enter as in their reversion.

§ 19. In the same manner it is of the tenant in especiall taile, etc. And the donees and their issue shall do to the donor and to his heires the like services, as the donor doth to his lord, next paramont, except the donees in frankmariage, who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

§ 21. And all these entailes aforesaid be specified in the said statute of W. 2. Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute¹. As if lands be given to a man, and to his heires

¹ When a particular case does not fall within the expressed terms of a statute, but the judge, conceiving that the legislator in pursuance of his general design would have embraced the case if it had been present to his mind, acts as if it was covered by the statute, the case is said to fall within the "equity of the statute." See Austin, 11., p. 596.—*Digby*.

males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entailes aforesaid, it is otherwise.

§ 22. In the same manner it is, if lands or tenements be given to a man and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

§ 23. And in case where lands or tenements be given to a man, and to the heires males of his bodie, and he hath issue two sonnes, and dieth, and the eldest son enter as heire male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heire male. But otherwise it is in the other entailes, which are specified in the sayd statute.

§ 24. Also, if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a sonne, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entaile; because whosoever shall inherit by force of a gift in taile made to the heires males, ought to convey his descent whole by the heires males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himselfe the descent by an heire male.

2 BL. COM., 113-116. Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*; which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni*. Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in

general. And this may happen several ways. I shall instance in only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*; here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee; but they being heirs *to be by him begotten*, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten (*viz., Mary, his present wife*), this makes it a fee-tail special.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male, general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *è converso*, the heirs male, in case of a gift in tail female. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the

others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his *heirs male* or *female*, is an estate in fee-simple, and not in fee-tail: for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression. . . .

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these: 1. That a tenant in tail may commit *waste* on the estate tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate tail. 4. That an estate tail may be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. . . .

Thus much for the nature of estates tail; the establishment of which family law (as it is properly styled by Pigott¹) occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books

¹ Com. Recov. 5.

are full; and treasons were encouraged, as estates tail were not liable to forfeiture longer than the tenant's life. So that they were justly branded as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

LEAKE, LAND LAW, 217. An estate tail may be created with a conditional limitation, or as it is here commonly called, a *proviso for cesser*, so that in a certain specified event the estate tail ceases, and the reversion or next vested estate in remainder takes effect in immediate possession.

Instances occur in settlements in which estates tail are limited with the proviso that if the tenant in tail in possession shall refuse or neglect to take the name and arms of the settler, the estate tail shall cease and determine as if he were dead and there were a failure of issue inheritable under the entail. A like proviso is sometimes used to determine the estate tail, if the tenant in possession shall neglect to reside upon the land, or if he shall become entitled to some other settled estate.

DIGBY, HIST. REAL PROP., Ch. V., § 2. Inasmuch as the estate of tenant in tail was, according to the metaphorical expression of the lawyers, "carved out of," that is, less than an estate in fee simple and different from it,¹ it followed that if tenant in fee simple made a gift in tail, such a gift was not within the Statute of *Quia Emptores*, but a tenure

¹ An estate tail is said to be less than a fee simple, because the law regards as a disposable interest the possibility of enjoying the lands after the determination, by failure of issue or otherwise, of the estate tail. There is no estate larger than a fee simple, because the law does not regard the possibility of the enjoyment of the estate after the failure of heirs general as a disposable interest. Littleton, sec. 18.

was created between tenant in tail and tenant in fee simple, the former holding of the latter. It must be borne in mind that estates tail are only known in freehold interests, and that there can be no estate tail in a chattel-interest, such as a term of years.

The history of the alienation of estates tail is connected with the difficult and obsolete doctrine of warranty, of which the courts took advantage to break in upon the policy of the law as conceived by the great barons who procured the enactment of the Statute of Westminster II. The effect of a warranty accompanying a gift of an estate of inheritance was to oblige the warrantor or donor to defend the possession of his donee. If the donee was ousted by a claimant establishing a superior title, the warrantor was bound to give the donee or his representatives lands of value equal to those of which he had been deprived. The burden of this obligation would descend to the heirs of the warrantor (at least to the extent of preventing the heir from disputing his ancestor's gift), and the benefit of it to the heirs of the donee. This principle would have been sufficient, if applied to estates tail, to have enabled a tenant in tail, by alienating his land with a warranty, to have given the purchaser an estate which his heir could not defeat. It seems, however, to have been held early in the reign of Edward II. that, if tenant in tail aliened the land with warranty, the heir of the tenant in tail was not bound by his ancestor's alienation and warranty (that is, could defeat the estate of the donee or his heirs by claiming in opposition to the gift of the ancestor), unless he had *assets* (lands in fee simple equivalent to those which had been granted away) by descent from his ancestor. On the other hand, if he had assets, the ordinary rule prevailed, and the heir of the warrantor was bound by his ancestor's warranty. And if the warrantor was a prior tenant in tail, who had died without issue, upon which, according to the limitations of the estate, the land went over to a subsequent tenant in tail, such last tenant in tail was bound by the warranty of his predecessor,

even though there were no assets. This was called *collateral* as opposed to *lineal* warranty.

The doctrine that the issue of the tenant in tail was bound by his ancestor's alienation with warranty only in cases where he had assets by descent, greatly narrowed the power of effectual alienation possessed by the tenant in tail. And it must be remembered that even where such alienation was binding on the issue, it would not bind the lord or donor so as to bar him of his reversion in the event of the failure of issue of the donee in tail.

Thus the Statute *De Donis*, as interpreted by the courts, put an effectual check to the practice of free alienation of estates, where, as was commonly the case, words of procreation were added to the words of inheritance. As time went on the great inconvenience of such a restriction was strongly felt. Titles were insecure, for an old entail, of which nothing was known, might be brought to light; nor would any period of enjoyment, however long, afford an answer to such a claim. "Farmers were ousted of their leases, creditors defrauded of their debts." The free alienation of land was restrained, a grievance which was probably felt with increasing severity in consequence of the impoverishment of the landowners caused by the wars of the Roses. The king, too, suffered by the protection against forfeiture which the practice afforded to the issue of a traitor. Thus all members of the community, except perhaps the great landowners themselves, were interested in obtaining a relaxation of the practice of strictly entailing lands which had grown up under the provisions of the Statute of Westminster II.¹

¹ "But the true policy and rule of the common law in this point was in effect overthrown by the Statute *De Donis Conditionalibus*, which established a general perpetuity by Act of Parliament for all who had or would make it, by force whereof all the possessions in England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs. And the same was attempted and endeavored to be remedied at divers parliaments, and divers bills were exhibited accordingly (which I have seen), but they were always on one pretence or

Although feigned recoveries,¹ or fictitious suits in which a writ of right was brought by a third person against the tenant, who thereupon suffered judgment to pass against him, had long been known as a mode of conveying lands, it was for some time thought that the heir of tenant in tail was not bound by a judgment so obtained against his ancestor. "In the reigns of Henry IV. and Henry V. some doubts began to be entertained whether a recovery suffered by tenant in tail was not good against the issue."² These doubts continued without being finally determined during the reign of Henry VI. They were at length set at rest by the introduction of a series of fictions, by virtue of which it was feigned that a gift with warranty had been made by the original donor of the tenant in tail, that a claim was made to the lands by a person having a title superior to that of the original donor, and that tenant in tail received from the original donor an equivalent for the lands of which he was deprived by the judgment. Further, the supposed original donor was made a party to the suit, and, upon his failing to defend his fictitious gift, he and his heirs were barred of their reversion. This was the course adopted, though possibly not for the first time, in the famous "Taltarum's Case" (12 Edward IV.) . . . From this time till 1834 (3 and 4 Will. IV., chap. 74) it became the common practice for tenant in tail to "suffer a recovery;" that is, by a proceeding similar to that adopted in Taltarum's case, to convert his estate into a fee simple. In effect, therefore, wherever an another rejected. But the truth was that the lords and commons, knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were before the said Act (and chiefly in the time of Hen. III., in the Barons' War), and finding that they were not answerable for the debts or incumbrances of their ancestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors they always rejected such bills, and the same continued in the residue of the reign of E. I. and the reigns of E. II., E. III., R. II., H. IV., H. V. and H. VI., till about the 12th year of E. IV., etc." *Sir Anthony Mildmay's Case*, Coke's Reports, 6.40. a. See Blackstone, II. 116.

¹ See page 418, *post.*—Ed.

² Reeves, ii. 573.

estate tail was given, tenant in tail might, so soon as he came of age, by this process give to another an estate in fee simple, which by arrangement might then be re-conveyed to himself, and thus he was enabled to cut off, bar, or defeat the expectations of his own issue, and the interests of all persons claiming after him in remainder or reversion. After a statute passed in the reign of Henry VIII. the same result might have been effected by a fine.

By the above-mentioned statute (3 and 4 Will. IV., c. 74) fines and recoveries were abolished, and tenant in tail may now, by a deed enrolled in the Chancery Division of the High Court of Justice, alienate his lands for any estate in fee-simple or otherwise, and thus defeat the expectations of his own issue and of all remaindermen and reversioners.

The only additional restriction imposed upon the alienation of an estate tail is that the consent of the person who is called the Protector of the settlement is necessary to its being effectually barred. Alienation by tenant in tail without this consent binds his own issue, but not remaindermen or reversioners, and creates what is called a "base fee." The Protector of the settlement is usually the tenant for life in possession; but the settlor of the lands may appoint in his place any number of persons, not exceeding three, to be together Protector during the continuance of the estates preceding the estate tail. The practical effect, therefore, of an estate tail at the present day is to prevent the alienation of lands for a valid estate of inheritance in all cases till tenant in tail comes of age. After this his power of disposing of the lands differs from that of tenant in fee-simple only in the mode in which it is exercised, and in the necessity, where the estate is not in possession, for the consent of the Protector.

SUG. GILB., USES, 33. A fine or recovery by an equitable tenant in tail has precisely the same operation as a fine or recovery by a legal tenant in tail, but no greater (1 Ch. Cas. 213); although it was once thought that a recovery would

not bar the remainders over. 1 Ch. Cas. 68. In later times it was held that equitable estates tail, with the remainders over, might be barred by a common conveyance (1 Vern. 440; 2 Vern. 131; *id.* 344; Prec. Ch. 81); or even by will (Prec. Ch. 228); but at this day it is well settled that a fine or recovery is as essential to bar an equitable as a legal entail in a freehold estate. 1 P. Wms. 87. . . . It is also settled as a general rule that a recovery of an equitable estate must in all respects imitate a legal recovery; and therefore the person suffering an equitable recovery must have such an equitable estate as, had it been a legal estate, would have enabled him to suffer a legal recovery.—*Sugden's note.*

(c) *Fee Tail in the United States.*

4 KENT COM., 14. Estates tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our revolution, subject equally to the power of being barred by a fine or common recovery. But the doctrine of estates tail, and the complex and multifarious learning connected with it, have become quite obsolete in most parts of the United States. In Virginia, estates tail were abolished as early as 1776; in New Jersey, estates tail were not abolished until 1820; and in New York, as early as 1782, and all estates tail were turned into estates in fee simple absolute. So, in North Carolina, Kentucky, Tennessee, and Georgia, estates tail have been abolished, by being converted by statute into estates in fee simple. In the States of Vermont, South Carolina, and Louisiana, they do not appear to be known to their laws, or ever to have existed; but in several of the other States they are partially tolerated, and exist in a qualified degree.¹

¹ Estates tail exist in Maine, Massachusetts, Delaware and Pennsyl-

N. Y. REAL PROP. LAW, § 22. Estates tail have been abolished; and every estate which would be adjudged a fee-tail, according to the law of this State, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the law of this State, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.

N. J. DESCENT ACT, § 11. That from and after the passing of this act where any conveyance or devise shall be made, whereby the grantee or devisee shall become seised in law or equity of such estate in any lands or tenements as under the statute of the thirteenth of Edward the first (called the Statute of Entails), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only, in such grantee or devisee, who shall possess and have the same power over, and right in, such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee the said lands and tenements shall go to and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common in fee, but if there be only one child, then to that one in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue in like manner; *provided* that the vana, subject, nevertheless, to be barred by deed, and by common recovery, and in two of these States by will.—*Kent*.

"In Pennsylvania, by the Act of Assembly of April 27, 1855, it was provided that whenever hereafter, by any gift, conveyance or devise, an interest in fee tail would be created according to the existing laws of the State, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable."—*Sharswood's note to 2 Bl. Com. 119*.

widow of any such grantee or devisee of such estate shall have her dower in the premises in like manner as if the said grantee or devisee had died seized thereof in fee simple; *and provided also*, that where any person shall marry a woman being a grantee or devisee and seized of such estate, the said husband, after the death of his said wife, shall have his curtesy in the said lands and tenements, if there be issue of the marriage, in like manner as if said wife had died seized of an estate of inheritance in fee tail of the premises.

MASS. PUB. STAT., 1882, c. 120, § 15. A person actually seised of lands as tenant in tail may convey such lands in fee simple by a deed in common form, in like manner as if he were seised thereof in fee simple; and such conveyance shall bar the estate tail and all remainders and reversions expectant thereon.

§ 17. Equitable estates tail, in possession or remainder, and all remainders and reversions expectant thereon, may be barred in the same manner as legal estates tail and the remainders and reversions expectant thereon.

CONN. GEN. L., § 2952. No estate in fee simple, fee tail, or any less estate, shall be given by deed or will, to any persons but such as are, at the time of making such deed or will, in being, or to their immediate issue or descendants, and every estate given in fee tail shall be an absolute estate in fee simple, to the issue of the first donee in tail.

CHAPTER IV.

ESTATES FOR LIFE.

(a) *Conventional Life Estates.*

LIT., § 56. Tenant for term of life is where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life; and he which holdeth for terme of another's life, is called tenant for terme of another man's life (*pur terme d'auter vie*).

§ 57. And it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for terme of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold; but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

CO. LIT., 42, a. If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay £10, &c., or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as *Bracton* saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude that by force thereof he was seised generally for terme of his life.

If a man make a lease of a manor that at the time of the lease made is worth £20 *per annum* to another until £100 be paid, in this case, because the annuall profits of the manor are incertaine, he hath an estate for life, if livery be made, determinable upon the levying of the £100. But if a man grant a rent of £20 *per annum* untill £100 be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will. As if a man by his will in writing devise his lands to his executors for payment of debts and untill his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattell, it shall go to the executors of executors for the payment of his debts; and so note a diversity betweene a devise and a conveyance at the common law in his lifetime. And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattels and no freehold, whose estates are created by divers acts of parliament. . . .

A., tenant in fee simple, makes a lease of lands to *B.*, to have and to hold to *B.* for terme of life, without mentioning for whose life it shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said an estate for a man's own life is higher than for the life of another.

41, *b.* "*Ou per terme de vie d'un autre home.*" Now it is to be understood, that if the lessee in that case dieth, living *cesty que vie* (that is, he for whose life the lease was made), he that first entreth shall hold the land during that other man's life, and he that so entreth is within *Littleton's* words, viz., tenant *per autre vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (*occupans*), because his title is by his first occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an occupant. In like manner it is of an estate created by law; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an occupant. But against the king there shall be no occupant, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no occupant of any thing that lyeth in grant, and that cannot passe without deed, because every occupant must claime by a *que estate*, and averre the life of *cesty que vie*. It were good to prevent the incertainty of the estate of the occupant to adde these words (to have and to hold to him and his heires during the life of *cesty que vie*), and this shall prevent the occupant and yet the lessee may assigne it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assigne his estate to divers men and their heires during the life of *cesty que vie*.

Id., 251, *a.* It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record. *In pais*, of lands and tenements which lie in livery, where a greater estate passeth by livery than the particular tenant may law-

fully make, whereby the reversion or remainder is divested, as here in the example that *Littleton* putteth when tenant for life alieneth in fee, which must bee understood of a feoffment, fine or recoverie by consent. If tenant for life, and hee in the remainder for life in *Littleton's* case, hath joyned in a feoffment in fee, this had beene a forfeiture of both their estates, because hee in the remainder is *particeps injuriæ*. And so it is if hee in the remainder for life had entred, and disseised tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder.

A particular estate of anything that lies in grant cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowson, rent, common, or of a reversion or remainder of land, by deed grant the same in fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may passe; and of that opinion is *Littleton* in our bookes.

5 CO. REP., 13, a. Between Peter Rosse and Aldwick in an *Ejectione firmæ*, which began Pasch. 37 Eliz. Rot. 499, the case was such; a lease is made to A. and his assigns, *habendum* to him during his life, and the lives of B. and C.; and if this limitation during the life of B. and C. were void or not, was the question. And it was adjudged, that the limitation was good; for where it was objected that when a man hath two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and therefore an estate for his own life, and for the lives of others, cannot stand together—to that it was answered and resolved, that in the case at bar, the lessee had but one estate, which hath this limitation, *scil.* during his life, and the lives of two others, and he hath but one freehold, and therefore there cannot be any drowning of estates in the case, but he hath an estate of freehold to continue during these three lives, and the survivor of them.—*Rosse's Case* (1598).

BL. COM., 120-123. We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law. We will consider them both in their order.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie*. These estates for life are, like inheritances, of feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to *A. B.* the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life of *the grantee*; in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life: and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law, for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death.

The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers* or *botes*. For he hath a right to the full enjoyment and use of the land, and all its profits during his estate therein. But he is not permitted to cut down timber, or to do other waste upon the premises; for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore,

if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblements* or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which, being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August the heirs of the tenant received the whole. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestuy que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterward they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural

profit of the earth. For when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

LEAKE, LAND LAW, 194. The case of general occupancy, where there is no limitation to a special occupant, is now supplied by statute. By the Wills Act, 1 Vict. c. 26 (repealing but substantially re-enacting the statutes 29 Car. II. c. 3, s. 12, and 14 Geo. II., c. 20, which previously enacted to nearly the same effect), the general power of disposition by will thereby given is expressly extended "to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof" (sec. 3). And it is enacted by sec. 6, "that in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or the administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Id., 219. An estate for life may be made determinable by a conditional limitation; as, if an estate be granted to a woman so long as she is unmarried, or until marriage, or during widowhood; or to a husband and wife during the coverture; or so long as the grantee shall dwell in a certain house, or until the grantee be promoted to a benefice, or for

any like uncertain duration included in the life. Such limitations create estates for life, which are liable to determine and cease by the event happening according to the condition during the life; the next vested estate in remainder then takes effect in possession, and intervening contingent remainders, if there be any, are excluded.

An estate for life may be limited to determine on alienation; or upon charging or attempting to charge the estate, or the rents and profits; so it may be limited to cease upon bankruptcy or insolvency. Conditions in restraint of alienation cannot be annexed to an estate tail or an estate in fee, simple, and in such cases they are void and inoperative as being repugnant to an inseparable incident of the estate.

WILLIAMS, REAL PROP. (17th ed.), 130. A tenant for life may grant over the land he holds for so long as he shall live; but he could not by the common law make any lawful disposition to endure for a longer period. And his common-law right of alienation is still all that he can exercise for his own exclusive profit. But at the present day a tenant for life has large *powers* of disposing of the land he holds, for the benefit of those entitled thereto after his death, as well as himself. Powers are means of conveying land independently of the right of alienation incident to the estate in the land. Under the modern system of settling land on one for life, and then on his sons successively in tail, no valid disposition of the land could be made by virtue of the estates so created, except for the father's lifetime, until a son attained twenty-one; when he could join in barring the entail. This was obviously inconvenient; and it therefore became usual to give to the tenant for life under a settlement powers of leasing the settled land for certain terms on specified conditions; and leases granted under such powers remained good after death, for the benefit of his successors under the settlement. . . .

. . . But now the Settled Land Act, 1882, gives to every tenant for life in possession of land under a settle-

ment large powers of leasing and also a power of selling or exchanging the settled land. Since these extensive statutory powers have been conferred on a tenant for life, it has been no longer usual to insert in settlements the old express powers of appointment, which were formerly used to effect the same objects.

4 KENT COM., 27. In New York an estate *pur autre vie*, whether limited to heirs or otherwise, is deemed a freehold only during the life of the grantee or devisee, and after his death it is deemed a chattel real. The interest of every occupant, general or special, is, therefore, in New York, totally annihilated; but the statute provisions in other States vary considerably upon this subject. In New Jersey, the act of 1795 is the same as that in New York; but the Virginia statute of 1792 follows in the footsteps of the English statute, and leaves a *scintilla* of interest, in certain events, in the heir as a special occupant; and this I apprehend to be the construction of the statute in Maryland of 1799. In Massachusetts, on the death of the tenant *pur autre vie*, the law is said to give the estate to his heir; and yet, in that and other States, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material.

N. Y. REAL PROP. LAW, § 24. An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee; after his death it shall be deemed a chattel real.

§ 210. . . . A greater estate or interest does not pass by any grant or conveyance than the grantor possessed or could lawfully convey at the time of the delivery of the deed. . . .

§ 212. A conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant can lawfully convey.

MASS. PUB. STAT., c. 125, § 1. When a person dies seised of land, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts and to the rights of the husband or wife and minor children of the deceased, as provided in the two preceding chapters.

(b) *Legal Life Estates.*

(1) CURTESY.

LIT., § 35. Tenant by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife, male or female, borne alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.

And some have said that he shall not be tenant by the curtesie unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved that the child was borne alive. Therefore *Quære*.

CO. LIT., 29, a. And first, of what seisin a man shall be tenant by the curtesie. There is in law a twofold seisin, viz., a seisin in deed, and a seisin in law, whereof more shall be said, secs. 468 and 681. And here *Littleton* intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie. A man seised of an advowson or rent in fee hath issue a daughter,

who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any seisin. *Et impotentia excusat legem.* But a man shall not be tenant by the curtesie of a bare right, title, use or of a reversion or remainder expectant upon any estate of freehold, unlesse the particular estate be determined or ended during the coverture.

29, *b.* If lands be given to a woman and to the heires males of her body, she taketh a husband and she hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibilitie could inherite the mother's estate in the land; and therefore where *Littleton* saith, *issue by his wife, male or female*, it is to be understood, which by possibility may inherit as heir to her mother of such estate. . . .

If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is, albeit the issue had dyed in the lifetime of her father before any descent of the land, yet shall he be tenant by the curtesie. If a woman seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dieth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meane time her land descended, and in pleading he must alledge that he had issue during the marriage.

30, *a.* Foure things doe belong to an estate of tenancy by the curtesie, viz., marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by

the curtesie. So if he hath issue which dieth before the descent, as is aforesaid. And albeit the estate be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

LIT., § 52. And *memorandum*, that in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.

Co. LIT., 40, a. . . . If a man taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibilitie might then have inherited. But if the wife had been attainted of felonie before the issue, albeit he had issue afterward, he shall not be tenant by the curtesie.

2 BL. COM., 126-128. *Tenant by the curtesy of England* is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the *Mirroure* to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*, so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis* (that is,

being his vassal or tenant), than to denote any peculiar favor belonging to this island.¹ And therefore it is laid down² that by having issue the husband shall be entitled to do homage to the lord, for the wife's lands, alone, whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of King Henry III. It also appears to have obtained in Normandy; and was likewise used among the ancient Almaines or Germans. And yet it is not generally apprehended to have been a consequence of feodal tenure, though I think some substantial feodal reasons may be given for its introduction. For if a woman seised of lands hath issue by her husband and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; for which reason the heir-apparent of a tenant by the curtesy could not be in ward to the lord of the fee during the life of such tenant. As soon therefore as any child was born the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. 3. The issue must be

¹ I should rather think, with Mr. Wooddesson, that this estate took its name from its peculiarity to England, and that it was afterwards introduced into Scotland and Ireland. 2 Woodd. 18. Tenant by the *curtesy* of England perhaps originally signified nothing more than tenant by the courts of England, as in Latin he is called *tenens per legem Angliæ*. See stat. *pro tenentibus per legem Angliæ*. App. to Ruff. 29.—*Chitty*.

³ Litt., § 90. Co. Litt., 30, 67.

born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence. The issue also must be born during the life of the mother, for if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because at the instant of the mother's death he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate, being once so vested, shall not afterwards be taken from him. In gavelkind lands, a husband may be tenant by the curtesy, without having any issue. But in general there must be issue born; and such issue as is also capable of inheriting the mother's estate. Therefore, if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male. And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence we may observe with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for, whether it were before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was be-

fore observed) tenant by the curtesy *initiate*, and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

WILLIAMS, REAL PROP. (17th ed.), 359. Equity also followed the law in giving to the husband the right to enjoy his wife's equitable estate of inheritance after her death for the rest of his own life, as tenant by the curtesy in equity, under circumstances similar to those which gave rise to a tenancy by the curtesy at law.

Id., 376. Wherever tenancy by the curtesy is recognized, the rules governing it do not differ materially from those stated in the text. In Virginia (Code of 1887, sec. 2429) and West Virginia (Code of 1891, p. 635, sec. 17), tenancy by the curtesy is expressly declared to exist in trust estates; but it is well settled that, in the absence of statute, curtesy attaches to equitable as well as to legal estates. . . . There has been some question as to the husband's right to curtesy in a determinable fee. The better opinion is that in a case of an estate upon condition or limitation, the happening of the event which determines the estate and causes it to revert to the grantor, will also defeat the husband's curtesy. But if the wife's estate is a conditional limitation which operates by the way of executory devise or shifting use and could not exist at common law, his curtesy right will not be affected by the happening of the contingency. . . . The husband cannot, however, become a tenant by the curtesy in a reversion or remainder expectant upon a life estate, unless such life estate terminates during coverture. . . . *Hutchins' note.*

(2) DOWER.

LIT., § 36. Tenant in dower is, where a man seised of certain lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and

dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, for she must be above nine yeares old at the time of the decease of her husband, otherwise she shall not be endowed.

§ 37. And note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custome of some county, she shall have the halfe, and by the custome in some towne or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

§ 38. Also, there be two other kinds of dower, *viz.*, dower which is called dowment at the church doore, and dower called dowment by the father's assent.

§ 39. Dowment at the church doore is, where a man of full age seised in fee simple who shall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

§ 40. Dowment by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels. In this case after the death of the son,

the wife shall enter into the same parcell without the assignement of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. M. 44, E. 3, f. 45.

§ 41. And if after the death of her husband she entreth, and agree to any such dower of the said dowers at the church doore, &c., then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church doore, &c., and then she may be endowed after the course of the common law.

§ 53. And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife, and dieth, his 2. wife shall not be endowed in this case, for the reason aforesaid.

Co. Lit., 31, a. Here this word (seised) extendeth itselfe as well to a seisin in law, or a civill seisin, as to a seisin in deed, which is a naturall seisin: but seised he must be either the one way or the other during the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry he hath

but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actuall possession, for it lieth not in the power of the wife to bring it to an actuall seisin, as the husband may do of his wife's land, when he is to be tenant by curtesie, which is worthy the observation. . . . Also of a seisin for an instant a woman shall not be indowed; as if *Cestuy que use* after the statute of 1 R. 3 and before the statute of 27 H. 8 had made a feoffment in fee, his wife should not be indowed.

ST. WESTM. II. (13 EDW. I., 1285), c. 34. And if a Wife willingly leave her Husband, and go away, and continue with her Advouterer, she shall be barred forever of Action to demand her Dower, that she ought to have of her Husband's Lands, if she be convict thereupon, except that her Husband willingly, and without Coercion of the Church, reconcile her, and suffer her to dwell with him; in which Case she shall be restored to her Action.

2 BL. COM., 129-132. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there anything in general more different than the regulations of landed property according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for in the laws of King Edmond the wife is directed to be supported wholly out of the personal estate. Afterwards, as

may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands, with a proviso that she remained chaste and unmarried, as is usual also in copyhold dowers, or free bench. Yet some have ascribed the introduction of dower to the Normans, as a branch of their local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia* and *dotalitium*) by the Emperor Frederick the Second, who was contemporary with our King Henry III. . . . However this be, the reason which our law gives for adopting it is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*. But a divorce *a mensa et thoro* only, doth not destroy the dower; no, not even for adultery itself by the common law. Yet now by the statute West. 2, if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. . . .

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir. Therefore, if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue

might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowerable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the courtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband, for a *transitory instant only*, when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a *single moment*, it seems that the wife shall be endowed thereof. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. . . . Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free bench. But where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower.

Id., 136-138. 4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities, . . . but also by detaining the title-

deeds or evidences of the estate from the heir, until she restores them: and, by the statute of Gloucester,¹ if a dowager alienes the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her dower by levying a fine, or suffering a recovery of the lands, during her coverture. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII., c. 10.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke, "A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least."² This description is framed from the purview of the statute 27 Henry VIII. c. 10, before mentioned, commonly called the Statute of *Uses*. . . . At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use*, or the profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have

¹ 6 Edw. I., c. 7.

² 1 Inst. 36.

become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from the dower. But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed, to be in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.

WILLIAMS, REAL PROP. (17th ed.), 367. Dower, as it existed previously to the operation of the Dower Act,¹ was of very ancient origin, and retained an inconvenient property which accrued to it in the simple times when alienation of lands was far less frequent than at present. If at any time during the coverture the husband became solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands to which any issue which the wife might have had might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life. This right having

¹ Stat. 3 & 4 Will. IV., c. 105.

once attached to the lands adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, even of those owing to the Crown. It was necessary, however, that the husband should be seised of an estate of inheritance at law; for the Court of Chancery, while it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands. The estate, moreover, must have been held in severalty or in common, and not a joint-tenancy; for the unity of interest which characterizes a joint-tenancy forbids the intrusion into such a tenancy of the husband or wife of any deceased joint-tenant; on the decease of any joint-tenant, his surviving companions are already entitled under the original gift to the whole subject of the tenancy. The estate was also required to be an estate of inheritance in possession; although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach. In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited. The dower of the widow in gavelkind lands consisted, and still consists, like the husband's curtesy, of a moiety, and continues only so long as she remains unmarried and chaste.

Id., 369-371. The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife previously to marriage, in lieu of dower. . . .

The dower of women married since the 1st of January, 1834, may be barred by the acceptance of a jointure in the same manner as before; but, in their case, the doctrine of jointures is of very little moment. For, by the Dower Act, the dower of such women has been placed completely within the power of their husbands. Under the Act no widow is entitled to dower out of any land, which shall have been absolutely disposed of by her husband in his lifetime or by his will, or in which he shall have devised any estate or interest for her benefit, unless (in the latter case) a contrary intention shall be declared by his will. And all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower. The husband may also either wholly or partially deprive his wife of her right to dower, by any declaration for that purpose made by him, by any deed, or by his will. As some small compensation for these sacrifices, the Act has granted a right of dower out of lands to which the husband had a right merely without having had even a legal seisin; dower is also extended to equitable as well as legal estates of inheritance in possession, excepting of course estates in joint-tenancy. The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support—unless, indeed, the husband should have executed a declaration to the contrary.

Id., 377. The legislation in this country in regard to dower is not uniform, and is much less sweeping than in England. In the following States dower has been expressly abolished by statute, and a provision made for the widow's benefit in the statutes of descent: California (Civ. Code of 1886, sec. 173), Colorado (Mills' Ann. Stat., sec. 1524), the Dakotas (Comp. Laws of 1887, secs. 2594, 3402), Indiana (Burns' Ann. Stat. sec. 2639), Iowa (1 McClain's

Ann. Code, sec. 3644), Kansas (Gen. Stat. of 1889, sec. 2619), Minnesota (Gen. Stat. of 1891, Kelly's ed., sec. 4001), Mississippi (Ann Code of 1892, sec. 2291), Washington (1 Hill's Ann. Stat., secs. 1405, 1482), and Wyoming (R. S. of 1887, sec. 2221). While statutory changes of more or less importance are found in other States, in the majority dower exists substantially as at common law. In New Hampshire (Pub. Stat. of 1891, chap. 195, sec. 3), Vermont (Rev. Laws of 1880, sec. 2215), and a few other States, it is restricted to the real estate of which the husband dies seised; but in Vermont a conveyance made by the husband during coverture with a fraudulent intention to defeat the wife's dower right is void as against her. See *Nichols v. Nichols*, 61 Vt., 426. Under our statutes, dower usually attaches to equitable as well as legal estates. . . . But the common-law rule prevails in several States; and in those in which it has been changed, it is generally held that the wife's right to dower in the equitable estates of her husband extends only to those cases in which he is possessed of such estates at the time of his death.—*Hutchins' note*.

(3) TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

LIT., § 32. Tenant in fee taile after possibility of issue extinct is, where tenements are given to a man and to his wife in especiall taile, if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees is tenant in taile after possibilitie of issue extinct.

§ 33. Also, if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case, if the

wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

§ 34. And note, that none can be tenant in taile after possibility of issue extinct but one of the donees, or the donee in especial taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during his life he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason above said.

2 BL. COM., 124-126. The next estate for life is of the legal kind, as contradistinguished from conventional; viz., that of *tenant in tail after possibility of issue extinct*. This happens where one is tenant in special tail; and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue: in this case the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly

mark him out, as this of tenant *in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, etc.; or, he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate if he alienes it in fee-simple: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made . . . of estates that are equal in their nature.

II. Estates not of Freehold.

CHAPTER I.

ESTATES FOR YEARS.

LIT., § 58. Tenant for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of yeares; and if the lessor in such case reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.

Co. LIT., 45, *b*. Words to make a lease be, demise, grant, to fearme let, betake; and whatsoever word amounteth to a grant may serve to make a lease. . . .

"De certaine ans." For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and herewith agreeth *Bracton*, *Terminus annorum certus debet esse et determinatus*. And *Littleton* is here to be understood, first, that the yeares must be certaine when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it

may depend upon an uncertainty, *viz.*, upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certain it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If *A.* seised of lands in fee grant to *B.*, that when *B.* payes to *A.* xx. shillings, that from henceforth he shall have and occupie the land for 21 yeares, and after *B.* payes the xx. shillings, this is a good lease for 21 yeares from henceforth. For the second, if *A.* leaseth his land to *B.* for so many yeares as *B.* hath in the mannor of *Dale*, and *B.* hath then a terme in the mannor of *Dale* for 10 yeares, this is a good lease by *A.* to *B.* of the land of *A.* for 10 yeares. If the parson of *D.* make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine then the time of death, *Terminus vitae est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis*. But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for 6 yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine.

If a man make a lease to *I. S.* for so many yeares as *I. N.* shall name, this at the beginning is uncertaine; but when *I. N.* hath named the yeares, then it is a good lease for so many yeares. A man maketh a lease for 21 yeares if *I. S.* live so long; that is a good lease for yeares, and yet is certaine in uncertainty, for the life of *I. S.* is uncertaine. . . . By the ancient law of *England* for many respects a man could not have made a lease above 40 yeares at the most, for then it was said that by long leases many were prejudiced, and many times men disherited, but that ancient law is antiquated.

46, b. "*Et quant le lessee enter per force del lease, donques il est tenant pur terme des ans.*" And true it is,

that to many purposes he is not tenant for yeares until he enter: as a release made to him is not good to him to increase his estate before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion, before entry. *Vide* sec. 567. But the lessee before entry hath an interest, *interesse termini*, grantable to another. *Vide* sec. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And so if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest in him: and if it be made to two, and one dye before entry, his interest shall survive. *Vide* Sect. 281.

2 BL. COM., 140-144. Of estates that are less than freehold, there are three sorts: 1. Estates for years. 2. Estates at will. 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.

* * * * *

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price,

than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

* * * * * * *

We have before remarked and endeavored to assign the reason of the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interessc termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seisin of the *land* remaining still in him who hath the free-

hold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to *A.* for the term of three years, and, after the expiration of the said *term*, to *B.* for six years, and *A.* surrenders or forfeits his lease at the end of *one* year, *B.*'s interest shall immediately take effect: but if the remainder had been to *B.* from and after the expiration of the said *three* years, or from and after the expiration of the said *time*, in this case *B.*'s interest will not commence till the time is fully elapsed, whatever may become of *A.*'s term.

DIGBY, HIST. REAL PROP., Ch. V., § I. *Leasehold Interests*.—The early history of leasehold interests or estates for years has already been noticed, and reference has been made to the change effected in the reign of Henry III., by which leasehold interests were erected into a distinct kind of estate or property in land.¹ This interest or property is less than freehold, it is wanting in the great characteristic of freehold—uncertainty as to the period at which the rights will come to an end. It is essential to a leasehold, or, as it is often called, a *chattel* interest in land, that the period of its termination should be fixed from the beginning, or at least be capable of being fixed.

The rights under consideration present characteristics wholly different to freehold interests as to the mode in which they are created, the kind of interest which may be given, the mode in which they devolve on the death of the person entitled, and the remedy by which the right is vindicated.

The proper mode of granting an estate for years at common law is by words of demise followed by the entry of the lessee. The appropriate words of the grant are *demisi, concessi et ad firmam tradidi*—demise, grant, and to farm let.

¹ See page 12, *supra*.—ED.

The lessee is sometimes called the *termor*, sometimes, from the main object of the transaction, the *farmer*. It was not necessary that the words of demise should be in writing until the passing of the Statute of Frauds (29 Car. II., c. 3), which rendered writing necessary for the validity of all leases, except those for a term not exceeding three years, and fulfilling certain conditions as to rent. In order to complete the interest of the lessee, it is, at common law, necessary that the words of demise should be followed by his entry on the lands. The words of demise, spoken or written, confer a right to enter, technically called an *interesse termini*, but the lessee does not become actually tenant in possession until he has made entry upon the land demised.

Leasehold interests, requiring no livery of seisin, may at common law be created so as to take effect in possession or enjoyment at a future time. This is impossible in freehold interests except in the case of remainders. A lease to commence next Christmas conveys a perfect right to the lessee to enter at Christmas, and to hold for the specified term. Again, leasehold interests are not subject to the rules affecting the devolution of freehold interests. Before the change recorded by Bracton,¹ the only parties who could under any circumstances have claimed the benefits of a lease on the death of the lessee were his executors or administrators, and that only when the lease rested on an express covenant by deed. Hence, when leasehold interests became rights of property (or rights available not only against the lessor, but also against all the world), it was natural that they should not be brought under the rule of primogeniture, but should pass under the will to the executors of the deceased, or, in the case of intestacy, to the administrator, with the rest of the chattels. Thus leasehold interests came to be classed with personal property. Since, however, they are rights over things immovable, they received the mongrel name of "chattels real," and cannot be

¹ See page 12, *supra*.—ED.

excluded from a treatise professing to deal with real property.¹

The nature of the remedy provided for the ejected leaseholder, *contra quoscunque dejectores*, has already been stated.² The writ then devised, however, left the lessee without remedy in two cases. First, not having the freehold, he was liable to be ousted by the successful plaintiff in a collusive action against the lessor, in which the lessor allowed judgment to go against him by default, or, as it was technically called, suffered a recovery. A partial remedy for this injustice was provided by the Statute of Gloucester,³ but the leaseholder was not wholly protected against a proceeding of this nature till the statute 21 Henry VIII., c. 15. Secondly, if the lessor ejected the lessee, and then enfeoffed a third person, the lessee could not bring his writ of *quare ejecit infra terminum* against the feoffee, because *he* was not the ejector; nor against the lessor, because *he* was not in possession. A further remedy was therefore necessary, and a writ was devised, being a development of the writ of trespass, and called the writ of *ejectio firmæ*, which was available in the case supposed against the feoffee. This proceeding was by a series of fictions (now abolished) extended, till, in the form of the action of ejectment, it became the appropriate means of asserting the right to the possession of land under whatever title, and took its place as the statutory substitute for all the forms of real actions. Thus the interest of the lessee for years was gradually protected at all points, and took its place as a distinct class of rights of property.

LEAKE, LAND LAW, 220. An estate for years may be made determinable by a conditional limitation, as the continuance of a life or lives or other uncertain event. Thus, a lease for 100 years, if *A.* shall so long live, creates a term of years determinable upon the death of *A.*; and upon the

¹ See page 12, *supra*.—ED.

² See page 13, *supra*.—ED.

³ 6 Edward I., c. 11. See Coke upon Littleton, 46, *a*.

death of *A.* there is no residue of the *term*, though there may be a residue of the years, so that a limitation over for the residue of the *term* is void, unless by *term* is meant the *time* and not the interest. A lease for so many years as *A.* shall live, not being limited by any certain period, is not an estate for years, but a freehold or an estate for life. An estate for 100 years, if *A.* and *B.* shall so long live, determines upon the death of either of them; but an estate for the lives of *A.* and *B.* continues until the death of the survivor.

2 BL. COM., 143. It is the duty of the tenant to maintain the title of his landlord. It results from the fealty which is incident to every tenure. It is one of the best settled principles of the law that neither the tenant, nor any one claiming under him nor by collusion with him, shall be permitted to controvert his landlord's title. In an action of covenant on the demise, the tenant cannot plead *nil habuit in tenementis*; in an action of ejectment, he cannot set up a title in himself or an outstanding title in another. If he has acquired a better title than the landlord, he is bound to surrender the possession at the termination of his lease, though he may afterwards prosecute his better title.—*Sharswood's note.*

BIGELOW, ESTOPPEL, 390. Creation of the relation of landlord and tenant has the effect in law of estopping the tenant to deny the sufficiency, for the lease, of the title thus admitted to exist in the landlord. We have already alluded to the fact that this estoppel is of modern origin. In the time of Lord Coke the only way in which a tenant could be estopped to deny the title of his landlord was by the acceptance of a sealed lease. That this estoppel took its rise from the seal, and differed in origin from the modern estoppel, is evident from the fact that in the case of a lease by deed-poll the estoppel was confined to the party sealing; while it is quite certain that at the present time it is immaterial to the existence of the estoppel whether the lease be by deed-

poll or by indenture, or even whether there be any written lease at all. And again the estoppel terminated with the expiration of the lease; while at the present day the estoppel continues until the surrender of possession.

Id., 393. The conclusion appears to be justified that the origin and character of the modern estoppel of the tenant is to be found in this ancient action of assumpsit for use and occupation. In this form of action what was sought to be recovered was, not technically rent, but compensation from day to day for actual enjoyment. But to the maintenance of the action the relation of landlord and tenant must be established; and when established the modern estoppel *in pais* arises. *Enjoyment by permission* is the foundation of the action, and is therefore the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions then are essential to the existence of the estoppel: first, possession; secondly, permission; when these conditions are present the estoppel arises.

CHAPTER II.

ESTATES AT WILL.

(a) Pure Tenancies at Will.

LIT., § 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if the tenant for yeares, which knoweth the end of his terme, doth sow the land, and his terme endeth before the corn is ripe. In this case the lessor, or he in the reversion shall have the corne, because the lessee knew the certainty of his terme and when it would end.

§ 69. Also, if a house be letten to one to hold at will, by force whereof the lessee entreth into the house, and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entrie, egresse and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee-simple, fee-taile, or for life, hath certaine goods within the sayd house, and makes his executors, and dieth; whosoever after his decease hath the house, his executors shall have free entry, egresse and regresse to carrie out of the same house the goods of their testator by reasonable time.

§ 70. Also if a man make a deed of feoffment to another of certaine lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

Co. Lit., 55, a. It is regularly true that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *prima facie* to differ, cleerly reconciled.

“Uncore si le lessee emblea la terre, et le lessor apres le embleer, &c.” The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reape the crop which he hath sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes, or sow hempe or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have the yeare's crop. But if he plant young fruit trees, or yong oaks, ashes, eimes, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c., but to every particular tenant that hath an estate incertaine, for that is the reason which *Littleton* expresseth in these words (*pur ceo que il n'ad aucun*.

certaine ou sure estate). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God. And the same law is of the lessee for yeares of tenant for life.

2 BL. COM., 145-147. The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of the lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress and regress, to cut and carry away the profits. And this for the same reason upon which all the cases of emblements turn; viz., the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the

lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will.

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And if rent be payable quarterly, or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved, in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.

(b) *Estates from Year to Year.*

2 BL. COM., 147. A tenancy from year to year is where tenements are expressly or impliedly demised by the landlord to the tenant to hold from year to year, so long as the parties shall respectively please; and there cannot be such a tenancy determinable only at the will of the tenant; for then it would operate as a tenancy for his life, which is not

creatable by parol, but only by feoffment or other deed. 8 East, 167. What was formerly considered as a tenancy at will has, in modern times, been construed to be a tenancy from year to year; and from a general occupation such a tenancy will be inferred, unless a contrary intent appear. 3 Burr. 1609; 1 T. R. 163; 3 T. R. 16; 8 T. R. 3. And so, in the cases in which the statute against frauds (29 Car. II. c. 3) declares that the letting shall only have the effect of an estate at will, it operates as a tenancy from year to year. 8 T. R. 3; 5 T. R. 471. So, where rent is received by a landlord, that raises an implied tenancy from year to year, though the tenant was originally let in under an invalid lease. 3 East, 451. So, if a tenant hold over by consent after the expiration of a lease, he becomes tenant from year to year (5 Esp. R. 173), even where the lease was determined by the death of the lessor tenant for life in the middle of a year. 1 H. B. 97.

But if the circumstances of the case clearly preclude the construction in favor of such a tenancy, it will not exist; as where a party let a shed to another for so long as both parties should like, on an agreement that the tenant should convert it into a stable, and the defendant should have all the dung for a compensation, there being no reservation referable to any aliquot part of a year, this was construed to be an estate at will. 4 Taunt. 128. And it must by no means be understood that a strict tenancy at will cannot exist at the present day; for it may clearly be created by the express will of the parties. *Id. ibid.* 5 B. & A. 604. 1 Dowl. & R. 272. So, under an agreement that the tenant shall always be subject to quit at three months' notice, he is not tenant from year to year, but from quarter to quarter. 3 Camp. 510.—*Chitty's note.*

DIGBY, HIST. REAL PROP., Ch. V., § 1. The inconveniences of tenancies at will induced the tribunals to provide some means of giving greater security to a tenant who held under no regular lease for years. The circumstances of the

letting—especially the character of the rent, whether payable yearly, half-yearly, quarterly, or otherwise—are looked to, in order to ascertain the nature of the interest which the parties intended to create. Most commonly the reservation of an annual rent and payment of any part of it is held to constitute what is called a tenancy from year to year. Such a tenancy can usually be put an end to only at the end of the current year of the tenancy, by either party giving at least half a year's previous notice to quit.¹ Other modifications of tenancies at will, such as quarterly, monthly, or weekly tenancies, can be created, depending in each case upon evidence as to the terms of the letting.

N. Y. REAL PROP. LAW, § 198. A tenancy at will or by sufferance, however created, may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises. . . . At the expiration of thirty days after the service of such notice, the landlord may re-enter, maintain ejectment, or proceed, in the manner prescribed by law, to remove the tenant, without further or other notice to quit.

¹ "This kind of lease was in use as long ago as the reign of Henry VIII." Blackstone, II. p. 147, note, citing Year Book, T. 13 Hen. VIII., 15, 16.

CHAPTER III.

TENANCY AT SUFFERANCE.

Co. Lit., 57, *b*. There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongfully holdeth over. As tenant *pur terme d'auter vie* continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespassse before entry.

Id., 270, *b*. By these two sections [Lit., §§ 459, 460] is to be observed, a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because betweene them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for yeares hold over his terme, &c., a release to him is void, for that there is no privity betweene them; and so are the books that speake of this matter to be understood.

2 BL. COM., 150. An estate at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant con-

tinueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant is ever imputed by law ; but his tenant, so holding over, is considered as an absolute intruder. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant : for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger : and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful ; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

Thus stands the law, with regard to tenants by sufferance, and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment ; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof ; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly value. And, by statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former rent, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

51 N. Y. REP., 539. At common law, a tenant who held over after the expiration of his term became a tenant by sufferance. He had only a naked possession, and no estate which he could transfer or transmit. He stood in no privity to his landlord, was not liable to pay any rent and was not entitled to any notice to quit. He held by the laches of the landlord, who could enter and put an end to the tenancy when he pleased. 4 Kent's Com. 118. This is still the law, except as modified by the statute.¹ At common law, when by the terms of the lease the tenancy terminated at a day certain, the landlord could always commence his action of ejectment to recover possession of his land, after the expiration of the lease, without any notice to quit; and this he could do, although the tenant became a tenant by sufferance by holding over the term without his permission. It was only in a tenancy from year to year, the termination of which was uncertain, that the tenant was entitled to notice to quit. The object of the notice was to give him information when the lease would terminate. In the former case such notice was contained in the lease itself, and in such case I cannot discover that it was ever made the subject of complaint that the tenant could be removed without notice. If within the meaning of our statutes (1 R. S. 745, 746) every tenant holding over his term for the briefest period is to be deemed a tenant by sufferance, and thus entitled to one month's notice to quit, then every lease for one year will be, at the will of the tenant, practically extended to a lease for thirteen months, as no proceedings can be instituted for his removal until the expiration of the month's notice. It cannot be conceived that the legislature, in a case where the parties have in the lease fixed a day certain for the termination of the tenancy, intended that the tenant may, by his own wrong, extend his holding for another month; and a construction leading to such a result should not be tolerated if it can be avoided. . . .

The notice is clearly necessary only in case there is such a

¹ 2 R. S. 745; Real Prop. Law, § 198 (page 295, *supra*).—ED.

tenancy at will or by sufferance as needs to be terminated. Such a tenancy is not created within the meaning of the statute by the tenant simply holding over his term without the assent of his landlord. To entitle the tenant who holds over a definite term to notice, the holding over must be continued for such a length of time after the expiration of the term, and under such circumstances as to authorize the implication of assent on the part of the landlord to such continuance. In such case the tenancy existing by the implied assent of the landlord ought to be terminated before the tenant can be removed, and in such case the tenant is a tenant by sufferance within the meaning of the statute, and cannot be removed by summary proceedings or action of ejectment without the previous notice to quit.—*Per* Earl, C., in *Smith v. Littlefield* (1873).

III. *Conditional Estates.*

LIT., § 325. Estates which men have in lands or tenements upon condition are of two sorts, viz., either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee-simple, reserving to him and his heires yearly a certaine rent payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c., that it shall bee lawfull for the feoffor and his heires into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeare, &c., that then it shall be lawfull to the feoffor and his heires to enter, &c. In these cases if the rent be not paid at such time or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heires enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to ouste thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition bee not performed, &c.

§ 326. In the same manner it is if lands be given in taile, or let for terme of life or of yeares, upon condition, &c.

Co. LIT., 201, a. *Littleton* having before spoken of estates absolute now beginneth to intreate of estates upon condition. And a condition annexed to the realtie, whereof *Littleton* here speaketh in the legall understanding, *est modus*, a qualitie annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c., may either be de-

feated, or enlarged, or created upon an incertaine event. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse aut non esse confertur.*

202, a. Regularly it is true that he that entreth for a condition broken shall be seised in his first estate, or of that estate which hee had at the time of the estate made upon condition, but yet this fayleth in many cases.

LIT., § 347. The second thing is, that no entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heires: and such re-entrie cannot be given to any other person. For if a man letteth land to another for tearme of life by indenture, rendring to the lessor and to his heires a certaine rent, and for default of payment a re-entry, &c., if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for terme of life atorne, &c., if the rent be after behind, the grantee of a reversion may distreine for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and ouste the tenant, as the lessor might have done or his heires, if the reversion had beene continued in them, &c. And in this case the entrie is taken away for ever; for the grantee of the reversion cannot enter *causa qua supra*. And the lessor nor his heires cannot enter; for if the lessor might enter, then hee ought to be in his former state, &c., and this may not bee, because hee hath aliened from him the reversion.

Co. LIT., 214, b. Hereupon is to bee collected divers diversities. First, betweene a condition that requireth a re-entrie, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as *Littleton* saith, shall take any advantage, as hath beene said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, untill *I. S.* come from *Rome*, the lessor grant the reversion over to a stranger, *I. S.* comes from

Rome, the grantee shall take advantage of it and enter, because the estate by the expresse limitation was determined.

So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow, *si tamdiu in pura viduitate viveret*. So it is if a man make a lease for a 100 yeares if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causa qua supra*.

2. Another diversitie is betweene a condition annexed to a freehold, and a condition annexed to a lease for yeares. For if a man make a gift in taile for a lease for life upon condition, that if the donee or lessee goeth not to *Rome* before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entrie; but if the lease had beene but for yeares, there the grantee should have taken advantage of the like condition, because the lease for yeares *ipso facto* by the breach of the condition without any entry was void; for a lease for yeares may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a voide thing an estranger may take benefit, but not of a voidable estate by entry.

215, a. Another diversitie is betweene conditions in deed, whereof sufficient hath beene said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like conditions in law, which doe give an entrie to the lessor, the lessor himselfe and his heires shall not onely take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their owne time. Another diversity there is betweene the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the statute of 32 H. 8. cap. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage

of a re-entrie by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c., and if the rent be behind a re-entrie, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32 H. 8. the grantee may take advantage thereof, and upon demand for the rent, and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c., of any lands, &c., which pertained to monasteries, &c., as also all other persons being grantees or assignees, &c., to or by any other person or persons, and their heires, executors, successors, and assignees, shall have like advantage against the lessees, &c., by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c., as the said lessors or grantors themselves ought or might have had.

Id., 233, *b*. As to conditions in law, you shall understand they bee of two natures, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence; upon skill and confidence, as here the office of parkership, and other offices in the next section mentioned and the like.

Touching conditions in law without skill, &c., some be by the common law, and some by the statute. By the common law as to every estate of tenant by the curtesie, tenant in tayle after possibilitie of issue extinct, tenant in dower, tenant for life, tenant for yeares, tenant by statute merchant or staple, tenant by *elegit*, gardian, &c., there is a condition in law secretly annexed to their estates, that if they alien in fee, &c., that he in the reversion or the remainder may enter, *et sic de similibus*, or if they claime a greater estate in court of record, and the like.

LIT., § 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any,

this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should bee good, then the condition should oust him of all the power which the law gives him, which should bee against reason, and therefore such a condition is void.

§ 361. But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heires or of the issues of such a one, &c., or the like, which conditions doe not take away all power of alienation from the feoffee, &c., then such condition is good.

SHEP. TOUCHSTONE, 120. The nature of an express condition annexed to an estate in general is this; that it cannot be made by, nor reserved to, a stranger; but it must be made by, and reserved to, him that doth make the estate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident. And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition that neither of them alone can well make an estate, or charge, of or upon the land; for the party that doth depart with the estate and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of an hundred men, yet it is subject to a condition still; and albeit some of them be persons privileged in divers cases, as the King, infants, and women covert, yet they also are bound by the condition. And a man that comes to the thing by wrong, as a disseisor of land whereof there is an estate upon condition in being, shall hold the same subject to the condition also. And when the condition is broken or performed, &c., the whole estate shall be defeated, so that if there be a lease for life made by deed

and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pounds to the lessor; if the lessee pay not this ten pounds, the estate in remainder is avoided also. . . . And further when he that hath right doth re-enter by force of such condition, he shall avoid all charges and incumbrances put upon the land after the condition made; for he that doth enter into land by force of such a condition must have it again in the same plight as it was when he parted with it. And finally, a condition for the most part will not determine the estate without entry or claim. So that howsoever a limitation hath much affinity and agreement with a condition, and therefore it is sometimes called a condition in law, both of them do determine an estate in being before, and a limitation cannot make an estate to be void as to one person, and good as to another; as if a gift be made in taile to one and his heires males, until he do such a thing, and then his estate to cease and go to another; yet herein they differ. 1. A stranger may take advantage of an estate determined by limitation, and so he cannot upon a condition. 2. A limitation doth always determine the estate without entry or claim, and so doth not a condition.

2 BL. COM., 152-157. Besides the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition thus understood, are of two sorts: 1. Estates upon condition *implied*. 2. Estates upon

condition *expressed*: under which last may be included, 3. Estates held *in vadio, gage, or pledge*. 4. Estates by *statute merchant* or *statute staple*. 5. Estates held by *elegit*.

1. Estates upon condition implied in law are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. . . . Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *vis.*, that they shall not attempt to create a greater estate than they themselves are entitled to. So if any tenants for years, for life, or in fee commit a felony, the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

2. An estate on condition expressed in the grant itself is where an estate is granted, either in *fee-simple* or *otherwise*, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate

for life be limited to *A.* upon his marriage with *B.*, the marriage is a precedent condition, and till that happens no estate is vested in *A.* Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the time limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. To this class may also be referred all base fees, and fee-simples conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the Second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate, etc.*; these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determinable and void.

A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton¹ denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a

¹ § 380. 1 Inst. 234.

limitation, as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made £500, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of £40 by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by *A.* to *B.*, on condition that within two years *B.* intermarry with *C.*, and on failure thereof then to *D.* and his heirs), this the law construes to be a limitation and not a condition: because if it were a condition, then, upon the breach thereof, only *A.* or his representatives could avoid the estate by entry, and so *D.*'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of *B.* determines, and that of *D.* commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.

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These express conditions, if they be *impossible* at the time

of their creation, or afterward become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with *Jane S.* by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterward by a condition either impossible, illegal, or repugnant. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed.

I SHARS. & B., LEAD. CAS., 123-126. There are certain technical words proper in themselves to make a condition; these are *sub conditione*, *proviso*, *itaquod* (Co. Lit., 203, *b*) and *quod si contingat* if followed by a clause of re-entry (*Id.* 204, *b.*, *Stanley v. Colt*, 5 Wall. 119). . . . But these words are not necessary to create a condition; it may be created by any words which show a clear, unmistakable intention on the part of a grantor or deviser to create an estate on condition, regard being had to the whole of the deed or will in which they occur. . . . A provision for re-entry is a distinctive characteristic of an estate on condition, and where in a deed the grantor has reserved the right of re-entry, upon the happening of any specified event,

in order to revest in himself his former estate, there the estate granted will be held to be one upon condition (*Attorney-General v. Merrimack Manufacturing Co.*, 14 Gray, 612), and this has been held where the provision for re-entry was appended to words of covenant (*Gibert v. Peteler*, 38 N. Y. 165).

As the technical words above mentioned are not absolutely essential to the existence of a condition, so their use does not necessarily create one, but may be so controlled by the context of the instrument in which the technical words occur as to fail of that effect. . . . And whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. . . . As the policy of law is to render the alienation and transfer of property as free as possible, conditions are not favored in law; and, therefore, whenever words can be construed indifferently as a condition, reservation, or a covenant, the tendency of the courts is to construe them as either of the latter rather than as the former.

* * * * *

Id., 186-189. It is sometimes a little difficult, from the mere phraseology of a provision, especially one occurring in a will, to determine whether it creates an estate on condition or a conditional limitation; while certain words are peculiarly appropriate to one or the other, yet there are words which have no absolute force, and may be used for either one or the other, and while the limitation over is generally looked to as determining the intent of the instrument, yet there may be a good conditional limitation without a devise over. *McCullough's Appeal*, 12 Pa. St. 197. As, however, there is a wide difference between the nature of an estate on condition and that of one on a conditional limitation, and especially with reference to the manner of their being terminated, it becomes of importance to properly distinguish provisions creating the one or the other.

The best general rule can be derived from considering the

great distinction between the two estates when created. The estate on condition has attached to it something that must be done to cause it to vest or to prevent it from being divested, or that must be left undone on peril of its destruction, upon the breach of which condition the estate becomes voidable, and the grantor or his heirs may destroy it by entry or some other positive act. The estate on a conditional limitation, on the other hand, has a fixed period, fixed by the happening of an event, beyond which it cannot continue; the instant the event happens, the estate is at an end, and the right of the tenant is absolutely and finally gone, without any further act on the part of any one. From this consideration may then be derived the general rule that whenever the intent of a deed or will in attaching a condition to a gift or devise of land is to compel or to prevent the performance of a certain act, there the instrument should be construed as creating an estate on condition; but where the intent is to fix certain bounds to the length of existence of an estate, there the instrument should be construed as making a conditional limitation.

The words ordinarily used in creating a condition are, as we have seen, "provided," "so that," "upon condition," etc. (*ante*, p. 123); while the terms "so long as," "while," "during," "until," are words ordinarily indicative of a conditional limitation. . . . The intent of the words, as above given, is not, however, inflexible, and there are instances where the word "provided" has been interpreted as making a conditional limitation. A devise to *R.* and *J.* of one-third, each, of certain land in fee, and to *W.* of the remaining one-third, and "at the death of *W.* his share to be equally divided between *R.* and *J.*, with this provision, in case the said *W.* should ever recover from the present malady under which he now labors (insanity), then he is to hold all the property devised to him for his own use and benefit," has been held to give an estate to arise by way of conditional limitation. *Montgomery v. Petriken*, 29 Pa. St. 118. And there is even an instance of the words "upon

condition," taken in connection with the rest of a deed, making a conditional limitation. In the recent case of *Camp v. Cleary*, Supreme Court of Appeals of Virginia, January term, 1882, 13 Reporter, 381, a grantor conveyed by deed of gift, to his grandson, three pieces of ground, on one of which pieces stood a mausoleum, and the gift was "upon the condition that if he (the grantee) shall ever . . . in any way whatsoever alienate or dispose of the said last-mentioned piece of land, or any part thereof, this deed shall cease and be void, and this last-mentioned piece of land, with the other two lots conveyed to him in fee, shall revert to and rest in his sister E. and her heirs forever." It was argued that this presented the case of a condition in restraint of alienation, and therefore void; but the Court held that it was the case of a conditional limitation, and therefore not open to the objection urged against its validity.

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The most material difference between a condition and a conditional limitation has been already adverted to; it is this, that to render a condition effective to terminate the estate to which it is attached, it must be taken advantage of by some act, and this can be done only by the grantor or his heirs, while on the expiration of an estate by the limitation it at once ceases, and the next estate in expectancy at once vests; . . . and a stranger may take advantage of the recurrence of the contingency on which the estate is limited. . . . This distinction was originally introduced "to get rid of the embarrassment arising from the rule of the ancient common law that an estate could not be limited to a stranger upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation: of a condition because it defeats an estate previously limited, and of a limitation because upon the happening of the contingency the estate passes to the person having the next expectant interest without entry or claim." Bigelow, J., in *Proprietors of Church v. Grant*,

supra. The design of the rule is to carry out the intent of the grantor or deviser, for if the estate over could not vest in possession in the grantee thereof without some act of the heirs of the grantor, the grantee might very possibly never receive the benefit intended for him. *Den ex d. Smith v. Hance*, 6 Hals. 244.

1D., 127-131. A condition may be made of almost anything that is not illegal or unreasonable, on the principle that the owner of land, who is not obliged to transfer it at all, may attach to its transfer such conditions and restrictions as he pleases, and in view of which the grantee takes the land, so long as they are not in contravention of any policy of law. . . .

While, however, great liberty is allowed in the creation of conditions, there are, nevertheless, some conditions and restrictions which the law prohibits as being contrary to public policy or as being repugnant to the estate granted.

First, it may be stated that a condition in general restraint of marriage is bad as against public policy and is incapable of enforcement; but to render a condition in restraint of marriage void, it must be in fact general, or at least unreasonable, and a condition that a person shall not marry before attaining a certain age, provided the age fixed be not an unreasonable one, is a good condition. *Shackelford v. Hall*, 19 Ill. 212. . . .

Conditions in general restraint of alienation are void, both as contrary to the policy of law in this country, and as repugnant to the estate granted, as said by Littleton, sec. 360: "Also, if a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all power which the law gives him, which should be against reason, and therefore such a condition is void," and, Coke adds, "and the like law is of a devise in fee

upon condition that the devisee shall not alien, the condition is void." . . .

The law at the present day is the same, and may be stated to be that a condition in general restraint of alienation, or that the grantee shall not alien during his life, is void. With regard to conditions imposing partial restraints upon alienation, the authorities are, however, not at one. A long line of cases holds that a condition imposing a partial restraint as to time, so long as the time is not unreasonably long, will be sustained. *Cornelius v. Ivins*, 2 Dutch. 376. . . .

Id., 136. An estate granted on condition, until it is forfeited for a breach thereof, differs in no respect from an estate absolute of the same extent, and may be used and enjoyed in precisely the same manner, except so far as the condition itself expressly curtails the free use and enjoyment of the land. . . .

GRAY, PERPETUITIES, § 282, note. In the time of Lord Coke words of condition restraining the use of land, although manifestly imposed for the benefit of other land in the neighborhood, would undoubtedly have been deemed to create a condition enforceable by entry. In England, however, for nearly, if not quite, two centuries, the remedy by entry for breach of condition attached to a conveyance in fee simple has been practically obsolete. In mortgages all remedies have been had in equity, and if in devises clauses in the form of a condition have been inserted to secure the payment of legacies to the heir or third persons, the right to such legacies has not been enforced by entry. . . . The practice of entry undoubtedly fell into disuse, because when the condition was for the payment of money, which it generally was, equity would restrain a forfeiture, and would in many cases enforce the payment as a trust. Yet it was a bold statement for Sugden to make in his treatise on Powers (1st ed.), 96 (1808), "That what by the old law was deemed a devise *upon condition* would now, perhaps, in almost every case, be construed a devise in fee upon trust,

and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity." But this statement, which is repeated by the learned author in all the subsequent editions—see 8th ed., p. 106 (1861)—though bold, was prophetic. In 1860 the Court of Queen's Bench and on appeal the Exchequer Chamber, held, in the case of *Wright v. Wilkin*, 2 B. & S. 232, 259, that upon a devise on condition that the devisee should pay certain legacies, the heir could not enter for breach of condition, but that the devisee took the land on trust; and this view was adopted by the House of Lords in *A. G. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1 (1873). . . . The same doctrine has been adopted in the Supreme Court of the United States, after elaborate argument, in *Stanley v. Colt*, 5 Wall. 119. So in Massachusetts. *Sohier v. Trinity Church*, 109 Mass. 1, 19; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Ayling v. Kramer*, 133 Mass. 12. . . . To the same effect is *Fuller v. Arms*, 45 Vt. 400. And in Connecticut it is said that all conditions which are not for the benefit of some individual or the public are void. *Mitchell v. Leavitt*, 30 Conn. 587. And see *Barrie v. Smith*, 47 Mich. 130. But see *Blanchard v. Detroit, &c., R. R. Co.*, 31 Mich. 43; *Underhill v. Saratoga R. R. Co.*, 20 Barb. 455; *Aikin v. Albany, &c., R. R. Co.*, 26 Barb. 289; *Douglas v. Hawes*, Ritchie, Eq., Dec. 146, 152.

IV. *Future Estates.*

CHAPTER I.

PRESENT AND FUTURE ESTATES.

2 BL. COM., 163. Hitherto we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual permanency of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore with respect to this consideration, may either be in *possession*, or in *expectancy*; and of expectancies there are two sorts; one created by the act of the parties, called a *remainder*; the other by act of law, and called a *reversion*.

Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estate *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. . . .

LEAKE, LAND LAW, 45-49. In the common law of freehold tenure seisin signifies the possession of the fee or freehold estate; the freeholder was described in law as *seised*, or invested with the seisin. The tenant in the actual possession or seisin was presumptively seised of an estate in fee

simple. If entitled only for a particular estate, he held the seisin not only in his own right, but also in right of all the estates in reversion or remainder under the same title; the owners of which participated in the seisin in order of succession, and were described as seised in reversion or in remainder; for the actual seisin represented the fee, or all the estates into which it might be subdivided.

The seisin, as representing the fee, was also used as the means of conveyance. Feoffment or the conveyance of a freehold estate was effected by *livery of seisin*, that is, by an actual delivery of possession. This originally constituted the efficient and essential act of conveyance, words being required only to explain the act, and, when necessary, to limit and direct the estates for which it was intended the seisin should be held.

A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to *A.* for life or in tail, and upon the determination of his estate to *B.*, the future limitation takes effect as a remainder immediately expectant upon *A.*'s estate. But upon a feoffment to *A.* in fee or for life, and after one year to *B.* in fee—or to *A.* in fee, and upon his marriage to *B.* in fee—or to *A.* in fee or for life, and, upon *B.* paying *A.* a sum of money, to *B.* in fee—the limitations shifting the seisin from *A.* to *B.* at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law. Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or im-

mediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title.

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. "Livery of seisin must pass a present freehold to some person and cannot give a freehold *in futuro*." "If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes."¹

As a consequence of the same rule if a feoffment were made to *A.* for life and after his death and one day after to *B.* for life or in fee, the limitation to *B.* was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of *A.*

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests in the fee.

Accordingly, a remainder might be limited to take effect upon a condition, or in a person not ascertained, as an unborn child, so as to be in abeyance or uncertainty until the condition happened or the person became ascertained. Such a limitation was good and might remain in uncertainty so long as the particular estate continued, as it was supported by the seisin of that estate. But it was essential that it should have become certain and absolute at the time when

¹ Co. Litt. 217, *a*; 5 Co. 94, *b*, *Barwick's Case*.

the particular estate determined; and if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect.

The term *seisin* did not apply to the possession of a tenant for years or leaseholder in his own right; he had no participation in the freehold, and was described in law simply as *possessed*. But his possession, being referred to the title of the freeholder under whom he held, constituted the seisin. The freeholder was still described as seised, though his seisin was subject to the lease for years.

Id., 313. It was a principle of the common law that the seisin or freehold could never be put in abeyance; that there must always be a present tenant to answer to the requirements of tenure. Whence the rule that an estate of freehold cannot be limited to commence at a future time.

But the freehold may be distributed into a particular estate and reversion or remainders; and the reversion or remainders, though vested in interest, are deferred or future estates in regard to the possession. Moreover, a remainder may be limited upon a contingency so as to defer also the vesting until the determination of the particular estate, consistently with the rule that the freehold shall not be in abeyance, as the tenancy is full during the continuance of the particular estate.

DIGBY, HIST. REAL PROP., Ch. V., § 3. An estate in expectancy, or, more accurately, a right of future enjoyment of lands, is distinguished from an estate in possession, or an estate of present enjoyment. The actual enjoyment or possession of lands is in the former case postponed until the lapse of a specified time, or the happening of some specified event. On the other hand, these estates differ from mere chances or possibilities of rights, inasmuch as they are distinct and definite interests known to the law, capable of alienation by the appropriate methods, and devolving at the death of the person entitled upon his representatives. Thus

in the case of a gift of lands to *A.* for life, and after his decease to *B.* and his heirs, *B.* has an estate in fee simple in the lands, postponed in point of possession or enjoyment till after the death of *A.*, but yet a present interest which he can dispose of in the proper method, and which will descend to his heir. On the other hand, the expectation of *C.*, eldest son of *D.*, tenant in fee simple, of succeeding to his father's lands, is not an interest recognized by the law, it is merely the hope or chance of having certain rights at some future time. If *C.* dies before his father, his eldest son succeeds, not as representing him, but as heir to *D.*, the grandfather.

N. Y. REAL PROP. LAW, § 25. Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy. An estate which entitles the owner to immediate possession of the property is an estate in possession. An estate in which the right of possession is postponed to a future time is an estate in expectancy.

§ 26. All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into

1. Future estates; and
2. Reversions.

§ 27. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

CHAPTER II.

REVERSIONS.

2 POLL. & MAIT., HIST. ENG. LAW, 21. Two technical terms are becoming prominent, namely, "revert" and "remain." For a long time past the word *reverti*, alternating with *redire*, has been in use both in England and on the mainland to describe what will happen when a lease of land expires:—the land will "come back" to the lessor. We find this phrase in those "three life leases" which Bishop Oswald of Worcester granted in King Edgar's day. We find it also in a constitution issued by Justinian, which is the probable origin of those "three life leases" that were granted by the Anglo-Saxon churches. But occasionally in yet remote times men would endeavor to provide that when one person's enjoyment of the land had come to an end, the land should not "come back" to the donor or lessor, but should "remain," that is, stay out for, some third person. The verb *remanere* was a natural contrast to the verb *reverti* or *redire*; the land is to stay out instead of coming back. Both terms were in common use in the England of the thirteenth century, and though we may occasionally see the one where we should expect the other, they are in general used with precision. Land can only "revert" to the donor or to those who represent him as his heirs or assigns: if after the expiration of one estate the land is not to come back to the donor, but is to stay out for the benefit of another, then it "remains" to that other. Gradually the terms "reversion" and "remainder," which appear already in Edward I.'s day, are coined and become technical; at a yet later date we have "reversioner" and "remainderman." When creating a life estate, it was usual for the donor to say expressly that on the

tenant's death the land was to revert. But there was no need to say this: if nothing was said the land went back to the donor who had all along been its lord.

LIT., § 19. . . . In every gift in taile without more saying, the reversion of the fee simple is in the donor. . . .

CO. LIT., 22, *b*. A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt*. Tenant in fee simple maketh gift in taile, so it is of a lease of life, or for yeares.

DIGBY, HIST. REAL PROP., Ch. V., § 3 (1). *Reversions*.—Where a freeholder grants away some estate smaller than that which he has himself, he has, in the metaphorical language of the law, an interest left in him, which, though not immediately an interest of present possession or enjoyment, will become such so soon as the smaller preceding interest has expired. Thus, where a tenant in fee simple has created an estate in tail, for life, or for years, he has left in him a present estate, which will come into possession or enjoyment on the expiration or sooner determination of the estate tail, the estate for life, or the estate for years. The smaller estate thus granted is called the "particular" estate. "A reversion," says Sir E. Coke, "is where the residue of the estate always doth continue in him that made the particular estate." It has already been observed, that between the reversioner and the tenant of the particular estate a *tenure* exists—the latter *holds* of the former. Hence, before the Statute 4 Anne, c. 16, the attornment of the tenant was necessary to complete the grant of the reversion; otherwise, the tenant would have had a new lord imposed upon him without his consent.

The proper mode of conveying or disposing of the reversion is by *grant*, that is, grant by *deed*, or writing on paper

or parchment *sealed* and *delivered*. Suppose *A.* has the reversion in fee simple expectant on an estate tail, or on an estate for life, or on an estate for years. He can by a simple deed of grant create any number of estates tail, or estates for life, or estates for years out of his reversionary interest, and dispose of them as he pleases. He can deal with the reversionary interest just as he can deal with an interest in possession, only he cannot give livery of seisin, for the simple reason that he has it not to give, inasmuch as he is not in actual possession of the lands. This, however, is subject to the exception that the reversioner is in one sense seised when the particular estate is only a lease for years. The lessee for years is, as has been said above, not *seised* of the lands, but only *possessed* of the term. Seisin, as has been seen, implies (1) actual possession, (2) possession as of freehold. Where, therefore, there is a particular estate of leasehold tenure, the reversioner, if he can obtain the consent of the lessee to come on the land for the purpose, can pass his interest by feoffment, accompanied by livery of seisin. In this case, however, he grants, not the reversion, but the freehold in possession.

When a reversioner desires, not to grant his reversion to a third person, but to convey it to the person who already has the particular estate, he is said to *release* the reversion. This he may do by deed. Supposing, therefore, in the case above put, *A.*, tenant of the reversion in fee, should execute a deed releasing his interest to tenant in tail, tenant for life, or tenant for years, the reversion in fee would coalesce with the particular estate in tail, for life, or for years. This coalescing of a smaller estate with a larger is called *merger*, the rule being that where the same person becomes entitled to two estates, the one of which is to take effect in possession during the continuance or immediately on the determination of the other, the smaller one is *merged* or swallowed up in the larger. So in the above cases, each of the tenants in possession, tenant in tail, tenant for life, and tenant for years, becomes at once tenant in fee simple in pos-

session. The same effect is produced by the surrender of the particular estate to the reversioner. The particular estate merges in the larger reversionary estate.

Thus, as the law became more refined, new modes of conveying lands from one person to another were introduced, destined, with some modifications to be hereafter noticed, to supersede in practice the old feoffment, fine, and recovery. If *A.*, tenant in fee simple, wished to convey the lands to *B.*, he might make a lease to him of the lands in question, upon which *B.* would enter, and was then at once capable of taking a release by deed of the reversion in fee. This was called conveyance by lease and release, and became in later times the usual mode of conveying lands.¹ . . .

A conveyance of the reversion might also be made to a stranger. In this case it was formerly necessary that the tenant of the particular estate, whether in tail, for life, or for years, should *attorn* to the grantee of the reversion, in other words, acknowledge him as the person of whom the lands were held. The necessity for attornment was done away with by 4 Anne, c. 16, secs. 9, 10. Thus two new modes of conveying the immediate freehold were added, *lease and release*, and *grant and attornment*.

LEAKE, LAND LAW, 315. In like manner, if the tenant of a particular estate convey the land for a less estate, he has a reversion left in himself; thus tenant in tail, by a disentailing assurance, may dispose of the lands entailed in fee simple or for any less estate; and if he make a disposition for a less estate, the reversion remains in him and is subject to the entail, unless it be wholly barred by the same assurance. If tenant in tail lease for life or for years at common law, without a disentailing assurance or any other special or statutory power in that behalf, he has a reversion; but such lease is valid only during his life, and is voidable at his death by the heir in tail. So, tenant for life may make a lease for years, and, however long the term of years may be, as it is not

¹ See pages 437, 502, *post.*—ED.

coextensive with the freehold, there is a reversion in the lessor. But such lease made under a special or statutory power is valid only during the continuance of the lessor's estate, and is avoided by his death.

If tenant for term of years make an underlease for a shorter term, by however small an interval of time, he has the reversion for that interval left in him. An underlease for a shorter term, "if the underlessee shall so long live," leaves a reversion expectant on the determination of the sub-term either by lapse of time or by the death of the underlessee. An underlease for the whole term, or for a greater term, operates as an assignment and leaves no reversion; it carries with it all the rights and liabilities incident to the term and leaves none of the incidents of a reversion. If tenant for term of years convey the land to another for an estate for life or in tail at common law, the whole term passes and there is no reversion.

The grant of a particular estate, leaving a reversion in the grantor, creates a tenure between the tenant of the particular estate and the reversioner. This tenure is not within the statute of *Quia emptores*, for that statute extends only to alienations in fee simple, preventing any new tenure arising upon such alienations. Hence rent reserved upon such a grant of a particular estate is of the nature of rent service, and is attended at common law with the remedy of distress. And a grant of the reversion impliedly carries with it all the incidents of the tenure, as the rent service, if any, unless there be an express exception of such incidents in the grant.

N. Y. REAL PROP. LAW, § 29. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

CHAPTER III.

REMAINDERS.

(a) *Vested Remainders.*

CO. LIT., 143, a. "*Remainder*," in legall Latine, is *remanere*, coming of the Latine worde *remaneo*; for that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time.

2 BL. COM., 163-168. An estate, then, in *remainder* may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to *A.* for twenty years, and, after the determination of the said term, then to *B.* and his heirs forever: here *A.* is tenant for years, remainder to *B.* in fee. In the first place an estate for years is created or carved out of the fee, and given to *A.*; and the residue or remainder of it is given to *B.* But both these interests are in fact only one estate; the present term of years and the remainder afterward, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to *A. for twenty years*, and after the determination of the said term to *B.* for life; and after the determination of *B.*'s estate for life, it be limited to *C.* and his heirs forever; this makes *A.* tenant for years, with remainder to *B.* for life, remainder over to *C.* in fee. Now, here the estate of inheritance undergoes a

division into three portions: there is first *A.*'s estate for years carved out of it; and after that *B.*'s estate for life; and then the whole that remains is limited to *C.* and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple: because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder, therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple: as £40 is part of £100 and £60 is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole £100 is appropriated, there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. And, first, there must necessarily be some particular estate precedent to the estate in remainder. As, an estate for years to *A.*, remainder to *B.* for life; or, an estate for life to *A.*, remainder to *B.* in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the in-

terest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder; because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would, therefore, be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to *A.* for seven years, to commence from next Michaelmas, is good; yet a conveyance to *B.* of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to *A.* for three years, with remainder to *B.* in fee, and makes livery of seisin to *A.*; here by the livery the freehold is immediately created, and vested in *B.* during the continuance of *A.*'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term.

The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made: or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards the remainder supported thereby shall be defeated also: as where the particular estate is an estate for the life of the person not *in esse*; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

2. A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As, where there is an estate to *A.* for life, with remainder to *B.* in fee: here *B.*'s remainder in fee passes from the grantor at the same time that seisin is delivered to *A.* of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it

be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law.

3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if *A.* be tenant for life, remainder to *B.* in tail; here *B.*'s remainder is vested in him, at the creation of the particular estate to *A.* for life; or if *A.* and *B.* be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to *A.* for life, remainder to the eldest son of *B.* in tail, and *A.* dies before *B.* hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that *B.* should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby: the

thing supported must fall to the ground, if once its support be severed from it.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if *A.* be tenant for twenty years, remainder to *B.* in fee; here *B.*'s is a vested remainder, which nothing can defeat, or set aside.

LEAKE, LAND LAW, 318. If a grant be made to *A.* for life, and after the lapse of a day after his death to *B.* for life or in fee, the limitation to *B.* is not a remainder, because it does not commence in possession immediately on the determination of the particular estate; it is a limitation of a freehold estate to commence *in futuro*, which in a common law conveyance is void, and the reversion of *A.*'s estate remains in the grantor.

Also a limitation which is to take effect in defeasance of a preceding estate, without waiting for the regular determination of that estate according to the terms of its limitation, is not a remainder; and such a limitation is void at common law. But the preceding particular estate may be made determinable by a conditional limitation, and the estate limited to take effect in possession immediately upon its determination, whether that happen under the conditional limitation or by the expiration of the full term of limitation, is a remainder.

The particular estate and the remainder must be created at the same time by one conveyance or instrument; for if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its char-

acter of a reversion, to which the tenure of the particular estate is incident.

Id., 320. Tenant of a particular estate of freehold may, in general, convey the land for a less estate with remainder over. A term of years, being personal estate, does not admit of limitation, at common law, into a particular estate and remainder. If tenant for term of years assign the term to a person for life, it operates as an absolute assignment of the whole term, however long the term may be. Tenant for term of years may make an underlease for a less number of years, thereby creating a new term in the underlessee with the reversion of the original term in himself; and he may make a further underlease to another person commencing at the expiration of the prior one. Where a lease was made to *A.* for ninety-nine years, if he should so long live, and if he should die within the term, the remainder thereof to *B.* for the residue of the term, it was construed as a lease to *B.* for so many of ninety-nine years as should be unexpired at the death of *A.*; the word *term* being construed, for the purpose of supporting the limitation, to mean the time or number of years mentioned. . . .

Upon the grant of a particular estate with remainder or remainders, leaving a reversion in the grantor, the relation of tenure is created between the successive tenants of the particular estate and remainders and the reversioner. But if the ultimate remainder is granted in fee leaving no reversion, no new tenure is created, and the tenants in succession hold of the chief lord by the statute of *Quia Emptores*. There is no tenure between the tenant of the particular estate and the remainderman; for the one does not derive title from the other, but both from the same source.

DIGBY, HIST. REAL PROP., Ch. V., § 3 (2). It follows, from the very definition of a remainder above given, that so soon as the fee simple is parted with, the donor has given away all that he has to grant, and can make no ulterior disposition. A remainder limited to take effect after a fee sim-

ple estate is simply void. Nor is the case altered when, as has been pointed out above, the estate in fee simple is liable to be terminated by the happening of some specified event. For instance, if an estate be granted to *A.* and his heirs so long as he continues unmarried, this estate will come to an end upon *A.*'s marriage; but the rule that a remainder cannot be limited after a fee simple would, *at common law*, prevent the settlor from making any ulterior gift, such as "and from and after the marriage of *A.* to *B.* and his heirs."

* * * * * *

The conception of a "remainder" is probably peculiar to English law, and is closely connected with the notions of estate and tenure. The tenant of lands has not the full property, but only an estate or interest of greater or less extent or duration. An estate in fee simple is considered as an aggregate out of which any number of smaller estates may be derived or carved; so long as the fee simple itself is not parted with, it is retained as a present interest or right, though the enjoyment or possession of it is postponed. So the interests which are parted with are regarded as present rights postponed in point of enjoyment. Roman law did not admit of the simultaneous existence in different persons of separate rights of future and present enjoyment over the same subject-matter, except perhaps in the case of *dominium*, and the so-called *jura in re aliena* (*ususfructus emphyteusis*, etc.). Where these rights existed, the interest of the *dominus* was closely analogous to an English reversion.

N. Y. REAL PROP. LAW, § 28. Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

(b) *Contingent Remainders.*

2 BL. COM., 168-172. Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a

dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain *person*. As if *A.* be tenant for life, with remainder to *B.*'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether *B.* will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if *A.* had died before the contingency happened, that is, before *B.*'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if *A.* were tenant for life, remainder to his eldest son in tail, and *A.* died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb.

This species of contingent remainders to a person not in being, must, however, be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines. As if an estate be made to *A.* for life, remainder to the heirs of *B.*; now, if *A.* dies before *B.*, the remainder is at an end; for during *B.*'s life he has no heir, *nemo est haeres viventis*: but if *B.* dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of *A.* This is a good contingent remainder, for the possibility of *B.*'s dying before *A.* is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of *B.* (if there be

no such person as *B. in esse*) is void. For here there must two contingencies happen: first, that such a person as *B.* shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born, is not good: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to *A.* for life, and in case *B.* survives him, then with remainder to *B.* in fee: here *B.* is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving *A.* During the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but is forever gone; but if *A.* dies first, the remainder to *B.* becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for *years*, or any other particular estate, *less* than a freehold. Thus if land be granted to *A.* for ten years, with remainder in fee to the right heirs of *B.*, this remainder is void; but if granted to *A.* *for life*, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the par-

ticular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest: the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest: and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency.

DIGBY, HIST. REAL PROP., Ch. V., § 3 (2). The doctrine of remainders at common law came in process of time to be subject to a further complication, which should be noticed here. Hitherto remainders have been treated as present or vested interests where the enjoyment is postponed till the lapse of a certain specified time or the happening of some specified event. A distinction subsequently arose between remainders where an estate of future enjoyment was

given to a definite existing person upon an event certain to happen, and where an estate of future enjoyment was created in favour of a person not existing, or not ascertained, or was to come into effect upon an event which might or might not happen. In the former case the remainder is said to be vested, in the latter it is said to be contingent.

In the case of a vested remainder nothing interferes with the enjoyment of the remainder-man, except the fact that the property is in the hands of the tenant of the particular estate. All that has to happen, in order that the remainder-man may come into enjoyment of the property, is the termination of the particular estate. Of course it may be that the person entitled to the remainder may as a fact never come into the enjoyment of the property, as, for instance, where lands are given to *A.* for life, remainder to *B.* for life, and *B.* dies before *A.*, but this does not affect the fact that *B.*'s interest, so long as it exists, is a vested remainder.

On the other hand, in the case of a contingent remainder, according to the rules of the common law, something must happen besides the determination of the particular estate before the interest created can come into actual enjoyment. If the remainder be limited to a person unborn or not ascertained, as, for instance, if lands be given to *A.* for life, remainder to the unborn son of *B.* in tail, in order that the contingent remainder may take effect, *B.* must have a son born, or at least begotten, in the lifetime of *A.* So soon as this happens, the remainder vests in the son of *B.* In other words, the future interest, which before was a contingent, now becomes a vested remainder. So if lands are given to *A.*, remainder to the heirs of *B.*, *B.* must die in *A.*'s lifetime, for *nemo est haeres viventis*; and if *B.* survives *A.* for ever so short an interval, his heir will never take, otherwise there would be a period during which the freehold would be in abeyance. So if lands are given to *A.* and *B.* jointly for life, remainder to the survivor in fee, so soon as one dies the contingent remainder which the other had is turned into a vested remainder, which again by the

operation of the doctrine of merger coalesces with the life estate, and the survivor becomes entitled to an estate in fee simple in possession. So again, if lands be given to *A.* till *C.* returns from Rome, then to *B.* and his heirs, this is a contingent remainder, for the estate upon which the expectant interest is limited to take effect is determinable on an event which may never happen. On the other hand, if the interest were expressed to take effect after the death of *A.* or upon *C.*'s return from Rome, whichever might first happen, the estate would be a vested remainder, for it is certain that *A.* will die.

The principles above laid down will suffice to explain the rule which prevails in the case of contingent remainders, that inasmuch as the freehold can never be in abeyance, "every contingent remainder of an estate of freehold must have a particular estate of freehold to support it." Thus not only must every contingent remainder of a freehold be ready to *vest*, that is, to become a complete right either of present or of future enjoyment (an estate in possession or a vested remainder) as soon as the preceding estate comes to an end, but that preceding estate must itself, at common law, be an estate of freehold. Lands cannot, at common law, be given to *A.* for ten years, remainder to the unborn son of *B.* . . .

Contingent remainders may be created in favor of unborn persons, provided only that the person who is to take the estate comes into existence before the preceding particular estate comes to an end. So soon as the designated person is born, the estate vests in him. Thus an estate might be given by way of remainder to an unborn person for life or in tail, subject only to the rule that no interest could be given to the unborn child of an unborn person. For instance, if an estate be given to *A.* for life, remainder to his unborn son in tail, remainder to *C.* in fee, the first remainder is contingent, that is, it does not become a completely vested interest, for the reason above given, till *A.* has a son born. So soon as this happens the interest is no longer contingent,

but vested or complete, and the son of *A.* has a vested remainder in tail, an interest which is ready to come into possession or enjoyment as soon as *A.*'s life estate determines. On the other hand, *C.* has an interest which is vested or complete from the moment of its creation.

Now if, before *A.* has a son born, his life estate determines by death, forfeiture or otherwise, or if he acquire the fee by taking a conveyance from *C.* of his interest, in which case before the birth of a son his life estate would merge or become united to or lost in the fee-simple, or if before the same event he convey his life interest to *C.*, in all the above cases the contingent remainder would, as the law formerly stood, have been destroyed, and no after-born son of *A.* would take any interest at all. This liability to be destroyed by the happening of any of the above events was the great characteristic of contingent remainders, and the ingenuity of conveyancers was exercised to prevent so inconvenient a result. A recent change in the law has removed the liability to destruction to which contingent remainders were subject by reason of the forfeiture, surrender, or merger of any preceding estate of freehold.¹

The same act renders contingent remainders alienable *inter vivos*. Formerly the chance or contingency was not considered an appropriate subject of alienation *inter vivos*, though it fell within the rights capable of being disposed of by will. At the present day, if lands are given to *A.* for life, remainder, if *C.* be living at his decease, to *B.* and his heirs, *B.* may dispose of his contingent interest during the lives of *A.* and *C.* by alienation *inter vivos*, or by will, or, upon his decease intestate, the contingent remainder will descend to his heir.

LEAKE, LAND LAW, 323. According to Fearn, "A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after

¹ 8 & 9 Vict., c. 106, s. 8.

the determination of the preceding estate.”¹ And, as he afterwards explains, “It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable; as the remainderman may die or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.”²

Fearne distinguishes four sorts of contingent remainders, which may be shortly exhibited in the following scheme: Remainders limited. 1. Upon an uncertain event, which also determines the particular estate by conditional limitation. 2. Upon an uncertain event, which does not affect the particular estate. 3. Upon a certain event, which may not happen until after the determination of the particular estate. 4. To a person not ascertained or not in being.³ But “all contingent remainders appear to be so far reducible under one head, that they depend for their vesting on the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination.”⁴

Id., 329-332. By the statute 8 & 9 Vic., c. 106, s. 8, it was enacted that “a contingent remainder existing at any time after the 31st December, 1844, shall be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened.”

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The limitation to trustees to preserve contingent remainders was rendered unnecessary by the above statute, as

¹ Fearne, C. R. 3.

² Fearne, C. R. 216.

³ Fearne, C. R. 5.

⁴ Butler's note *g* to Fearne, C. R. 9.

against the forfeiture, surrender, or merger of the particular estate. But it may still be necessary or expedient in some cases for preserving contingent remainders against the regular determination of the particular estate: as in the case of a settlement on *A.* for life, with remainder to the first son of *A.*, who shall attain twenty-one; to preserve which remainder the estate of the trustees must be extended to cover not only the life of *A.*, but the possible minority of a son after his death. So in case of a limitation to *A.* for life with remainder to the heir of *B.*, in which case the estate of the trustees must be extended to the life of *B.* So where the estate for life is determinable by a conditional limitation, as where it is subject to a shifting clause or proviso for cesser in a certain event, there must be a vested estate in trustees to take effect upon such determination in order to preserve contingent remainders until the expiration of the life. So where it is required to limit contingent remainders upon a term of years, a vested estate of freehold must be limited to support them.

Id., 337. The limitation of a contingent remainder, as it conveys no estate, but only a possibility of an estate in a future event, does not interfere with the limitation of the freehold subject to the contingency. Thus, a contingent remainder for life (or in tail may be followed by the limitation of a vested remainder; and such vested remainder will give place to the contingent remainder upon its becoming vested during the continuance of the particular estate. As if land be limited to *A.* for life, with remainder to his first and other sons successively in tail, with remainder to *B.* for life, with remainder to his first and other sons successively in tail, with remainder over.

The law is stated by Fearn, with reference to conveyances at common law, that "where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested;" but two or more several contingent remainders in fee may be limited as substitutes or alternatives one for the other, so that one only take effect, and every subsequent lim-

itation be substituted for the former if it should fail of effect.¹

GRAY, PERPETUITIES, § 101. Since contingent remainders have been recognized, the line between them and vested remainders is drawn as follows: A remainder is vested in *A.*, when, throughout its continuance, *A.* or *A.* and his heirs have the right to the immediate possession, whenever and however the preceding estates determine; or, in other words, a remainder is vested, if, so long as it lasts, the only obstacle to the right of immediate possession by the remainder-man is the existence of the preceding estates; or, again, a remainder is vested if it is subject to no condition precedent, save the determination of the preceding estates.

§ 102. A remainder is none the less vested because it may terminate before the remainder-man comes into possession; thus if land be given to *A.* for life, remainder to *B.* for life, *B.* may die before *A.*, yet the remainder is vested, for, during its continuance, namely, the life of *B.*, it is ready to come into possession whenever and however *A.*'s estate determines. This result is not affected by the fact that the termination of the remainder is contingent; that is, that it is subject to a condition subsequent. For instance, if land is devised to *A.* for life, remainder to *B.* and his heirs, but if *B.* dies unmarried then to *C.* and his heirs, *B.*'s remainder is vested, although it is possible that he may die unmarried in *A.*'s lifetime.

§ 103. The law favors the vesting of estates, and therefore prefers to construe conditions as subsequent rather than precedent; so that when a condition attached to a remainder would terminate it after it had come into possession, the condition will be deemed subsequent and the remainder vested, although the contingency may happen before the end of the particular estate, and so the remainder may never come into possession, as in the case put in the preceding section.

¹ Fearne, C. R. 225, 373.

§ 104. One class of cases, however, presents some difficulty, those, namely, in which the contingency, if it happens at all, must happen before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to *A.* for life, remainder to *B.* and his heirs, but if *B.* dies before the termination of the particular estate, then to *C.* and his heirs. Here, if the condition ever affects *B.*'s estate at all, it will prevent it from coming into possession; it will never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

§ 105. 1. If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which never can divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted.

§ 106. 2. Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen, if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time, if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to *A.* for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive *A.* should he at that moment die.

§ 107. The New York Revised Statutes seem to have defined a vested remainder in this sense: "Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the

possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain." It is doubtful whether this piece of legislative definition was intended to change the common law; but the courts have decided, and it would seem correctly, that it has done so. And it is conceived that the adoption of this view necessitates the decisions of the Court of Appeals, which at first appear rather startling, that since the abolition of the rule in *Shelley's Case* a remainder to heirs, after a life estate to the ancestor, is vested.

§ 108. 3. Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or [into] the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to *A.* for life, remainder to his children, but if any child dies in the lifetime of *A.* his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to *A.* for life, remainder to such of his children as survive him, the remainder is contingent.

§ 125. It has been a common notion that to a certain extent remoteness of limitation was prevented in the early times by means of a supposed rule that no future interest could be limited to the unborn child of an unborn person, because such a limitation would be a possibility upon a possibility. But the idea that there cannot be a possibility on a possibility seems to have been a conceit invented by Chief Justice Popham.¹ The idea is expressed in different forms. Thus, it is said, a lease could not "commence upon a contingent which depended upon another contingent."² "A possibility which shall make a remainder good, ought to be

¹ Rector of *Chedington's Case*, 1 Co., 153, *a*, 156, *b*; *Cholmley's Case*, 2 Co., 50, *a*, 51, *b*.

² 1 Co., 156, *b*.

a common possibility and *potentia propinqua*.”¹ “A possibility cannot increase upon a possibility.”² “Sometimes one possibility shall not beget another.”³ “The law will never intend a possibility upon a possibility.”⁴ But in none of these shapes does it meet with any countenance in the earlier cases.

Id., p. 86, note. As the notion of a possibility on a possibility had not roots in the law, so it flourished but a short time. In 1681 Lord Chancellor Nottingham, in the great case of the Duke of Norfolk, said “that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's Case*, 1 Co. 156, *b*, looks like a reason of art; but in truth has no kind of reason in it, and I have known that rule often denied in Westminster Hall.” 3 Ch. Cas. 29. See *Mayor of London v. Alford*, Cro. Car. 576, 577; *Love v. Windham*, 1 Sid. 450, 451; *Thellusson v. Woodford*, 4 Ves. 227, 327. And although the doctrine was enunciated by Lord Mansfield, C. J., and Wilmot, J., in *Chapman d. Oliver v. Brown*, 3 Burr. 1626, 1634, 1635, and has been mentioned without disapproval by esteemed writers, Fearne, C. R., 250; 2 Bl. Com. 169, 170; 2 Cas. & Op. 435; yet it is now admitted to be without force, except as the doubtful parent of the alleged rule that life estates cannot be limited to successive generations. Fearne, C. R., 251, Butler's note; *Cole v. Sewell*, 4 Dr. & W. 1, 32; Third Real Prop. Comm. Rep. 29; 1 Prest. Abs. 128; 1 Leake, Land Law, 335; Sugd. Pow. (8th ed.), 393, 394; Wms. Real Prop. (13th ed.), 274-277; secs. 191-199, *post*.

N. Y. REAL PROP. LAW, § 30. A future estate is either vested or contingent. It is vested when there is a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate

¹ 2 Co., 51, *b*.

² 8 Co., 75, *a*.

³ 3 Bulst., 108.

⁴ Co. Lit., 184, *a*.

or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

§ 42. A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

§ 47. An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

§ 48. A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterward happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

§ 49. An expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession.

(c) *Contingent Uses and Devises.*

I CO. REP., 129. And it was said, that no uses shall be executed by the stat. of 27 H. 8. which are limited against the rules of the common law, and the reason thereof is manifest; for it appears by the preamble of the stat. of 27 H. 8. that it was the intent of the makers of the act to restore the ancient common law of the land, and to extirpate and extinguish such subtle practised feoffments, fines, recoveries, abuses and errors, tending to the subversion of the good and ancient common law of the land; so that it fully

appears that this act of 27 H. 8. shall not execute any use which is limited against the rule of the com. law, for the intent of the act was to extinguish and extirpate not the feoffm., fine or recovery, for these were laudable and good conveyances of lands and tenements by the com. law, as is in effect recited in the beginning of the preamble; but such uses which are abuses and errors, and therefore erroneous because they are against the rule of the com. law, and therefore this law of 27 H. 8. is a law of restitution, *scil.* to restore the good ancient common law which was in a manner subverted by abusive and erroneous uses. And therefore if a man at this day makes a feoffment in fee to the use of *A.* for years, and after to the use of the right heirs of *B.* or to the use of the wife of *B.* who shall be; this limitation to the right heirs and to the wife is void, because it had been void, if it had been limited in possession, *ut patet* M. 2 & 3 Eliz. Dy. 190, 191. So in the same case, if the use be limited to *A.* for life, and after to the use of the right heirs of *B.* or to the wife of *B.* who shall be, if *A.* dies and after *B.* dies, or takes wife, this remainder limited to the right heirs or to the wife of *B.* is void, for it would be void, if it had been limited in possession. And the statute 27 H. 8. intended to restore the good and ancient common law, and not to give more privilege to the execution of uses than to estates, which are executed by the ancient common law. And in proof thereof, it was resolved by all the Justices of England, Pasch: 35 Eliz., in the case of the Earl of Bedford, referred to them out of the Court of Wards, and was thus in effect. Francis, Earl of Bedford, made a feoffment in fee of divers manors to the use of himselfe for years, and after to the use of John Lord Russel his son and heir apparent, and to the heirs males of his body begotten, and for want of such issue to the use of the right heirs of the said Earl; and afterwards the said John Lord Russel died without issue male in the life of the said Earl; and it was resolved, that the use and estate limited by way of remainder to the right heirs of the Earl was void, for it had

been void, if it had been limited by estate executed at the common law, for the remainder ought to vest during the particular estate.—*Chudleigh's Case*.

SUG. GILB. USES, 153. *Future or contingent uses* are properly uses limited to take effect as remainders; for instance, a use to the first unborn son of A., after a previous limitation to him for life, or for years determinable on his life, is a future or contingent use; but yet does not answer the notion of either a shifting or a springing use. They naturally arose after the statute in imitation of contingent remainders.—*Sugden's note*.

Id., 164. The rule of law in regard to contingent remainders of a freehold interest is that a vested estate of freehold must precede, in order to support it. See Co. Lit. 143, a; 217, a; and that it must vest *eo instanti*, that such previous estate determines. Before the statute of uses this rule did not apply to uses, because the freehold remained in the feoffees; therefore, if before the statute a man had made a feoffment to the use of one for years, remainder to the right heirs of J. S., this limitation had been good. But in *Chudleigh's Case*, 1 Rep. 135, Gaudy, J., said that such limitation after the statute is void, for then the freehold would be in suspense, for nothing can remain in the feoffees; and this observation was cited and approved of by Mr. Justice Hutton, in *Buckley v. Simmonds*, Winch, 60; and see 1 Atk. 596. But it appears to be now well settled that where an estate is limited previously to a future use, and the future use is limited by way of remainder, it shall be subject to the rules of the common law, and consequently, if the previous estate is not sufficient to support it, shall be void. . . .

In these cases, then [*Adams v. Savage*, 2 Ld. Raym. 885; 2 Salk. 680; *Rowley v. Holland*, 22 Vin. Abr. 189, pl. 11], it was solemnly decided that a future or contingent use must, like a contingent remainder, have a sufficient preceding estate to support it; and that a use limited by way of remainder shall not be construed a springing use, although

actually void in its creation if not so considered.—*Sugden's note.*

GILB. DEVISES, 62. Contingent remainders are at the common law, and arise in conveyances as well as wills; one may limit an estate to *A.*, the remainder to another; and so it may be by devise, if the intent of the parties will have it so; but as at the common law all contingent remainders shall not be good, so in wills no such latitude is given, as if *none* could be bad; *they are subject to the same fate in wills as in conveyances.* An executory devise needs no particular estate to support it, for it shall descend to the heir till the contingency happen; it is not like a remainder at common law, which must vest *eo instante* that the particular estate determines: but the learning of executory devises stands on the reason of the old law, wherein the intent of the devisor is to be observed; for, where it appears by the will, that he intends not the devisee to take but *in futuro*, and no disposition being made thereof in the meantime, it shall then descend to the heir—till the contingency happens.

LEAKE, LAND LAW, 356. Future estates and interests in land taking effect under the power of disposition by will are either by way of remainder, as at common law, or executory devise; the latter having been defined as “a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder.”¹

A devise by way of remainder is regulated by the rules of common law. Accordingly, the devise of a contingent remainder must vest before or at the determination of the particular estate; if it do not so vest, it fails altogether, and cannot afterwards be supported as an executory devise; thus,

¹ 1 Jarman on Wills, 778. According to Fearne, “an executory devise is such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.” Fearn, C. R., 386.

where a devise was made to *A.* for life, with remainder to *B.* for a term of years if he should so long live, and after the deaths of *A.* and *B.* to the heirs of the body of *B.*, it was held that the devise over to the heirs of the body of *B.*, being a contingent remainder, failed by the death of *A.* before *B.*, by which event the preceding freehold estate was determined before the remainder had become vested.¹ So, where the devise was to *A.* for life, and after his death to the children of *A.* who should attain twenty-one, it was held that the devise to the children failed upon the death of *A.*, leaving a child who did not attain that age until afterward;² and that a devise over if there should be no such child, being also a contingent remainder, failed under the same circumstances.³

(d) *Rule in Shelley's Case.*

I CO. REP., 104, *a.* And as to what hath been objected, that forasmuch as the limitation was to the heirs males of the body of Edward Shelley; and of the heirs males of the body of the heirs males lawfully begotten, that the heirs males of the body of Edward Shelley should be purchasers, for otherwise the subsequent words would be void; the defendants' counsel answered, that it is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase. And that appears in 40 E. 3. fol. 9. *a. b.* in the provost of Beverley's case, in 38 E. fol. 31. *b.* 24 E. 3. 36. *b.* 27. E. 3. fol. 87. *a.* and in divers other books.—*Shelley's Case* (1579).⁴

¹ *Doe v. Morgan*, 3 T. R. 763.

² *Holmes v. Prescott*, 33 L. J. C. 264.

³ *Perceval v. Perceval*, L. R. 9 Eq. 386.

⁴ Estates are defined and ascertained by the terms of limitation in which they are legally expressed and conveyed. "It is the province of a limitation to mark the period or event for the commencement, and the

Co. Lit., 22, *b*. If a man make a gift in taile, or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said that *haeres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

DIGBY, HIST. REAL PROP., Ch. V., § 3 (2). There is one rule of construction of great technicality, but at the same time of much practical importance, which should be noticed in connection with the doctrine of remainders. It has been seen that in a grant to *A.* and his heirs, or to *A.* and the heirs of his body, the words "heirs," "heirs of his body," or their equivalents, are words of limitation and not of purchase, they are merely descriptive of the estate taken by *A.*, and do not express that any estate is conveyed to *A.*'s heir. The same rule applies, although the words of the grant may appear to convey expressly an estate to the heirs by way of remainder. Thus, if a gift be made to *A.* and after his decease to his heirs, or to *A.* for life and after his

time of continuance or duration of an estate, either by years, lives, or the series of heirs; also the determinable qualities of an estate; as for twenty-one years, if *A.* should so long live," etc. Preston's Shepp. Touch. 117.

The use of words in limiting or defining an estate requires to be carefully distinguished in practice from the use of words in appropriating the estate to the purchaser, as the person is commonly called to whom the estate is destined. Many words, as "heirs," "issue," "children," etc., are capable of a double import, as words of limitation and words of purchase; and they are often used ambiguously, especially in wills. . . .

The word purchase (*perquisitio*) is applied in law to any lawful mode of acquiring property by the person's own act or agreement, as distinguished from acquisition by act of law, as descent, escheat and the like. A purchase in the above sense includes acquisition not only under a contract of sale for a valuable consideration, but also by gift or without consideration, and by devise.—*Leake, Land Law*, 152.

decease to *B.* for life (or to *B.* and the heirs of his body), with an ultimate remainder to the heirs of *A.*, the above rule operates to prevent the vesting of any estate in the heir directly by the gift; *A.* (in the last case) has two estates, one for life in possession, the other in fee in remainder; if the intermediate estate of *B.* be taken away, merger takes place, and *A.* becomes tenant in fee in possession. This doctrine is known by the name of the "rule in *Shelley's Case*," and may be stated as follows: Wherever there is a limitation to a man which if it stood alone would convey to him a "particular" estate of freehold, followed by a limitation to his heirs or to the heirs of his body (or equivalent expressions) either immediately, or after the interposition of one or more other particular estates, the apparent gift to the heirs or heirs of the body is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heir.

LEAKE, LAND LAW, 357. The rule in *Shelley's Case* applies to limitations of remainders to *heirs*, etc., in wills in exactly the same manner as in conveyances at common law; that is to say, if a devise be made to a person for an estate of freehold, with a remainder, either immediately following that estate or after other intermediate remainders, to the *heirs* or *heirs of the body* of the same person, the word *heirs* is taken as a word of limitation and not of purchase, and the remainder vests in the ancestor, as if limited to *him and to his heirs*. Accordingly, where land was devised to *A.* for life, with remainder to his first and other sons successively in tail, with remainder to the heirs of *A.*, and *A.* died in the lifetime of the testator, it was held that the devise of the ultimate remainder lapsed and his heir took nothing, the word *heirs* being used as a word of limitation and not of purchase.¹

The rule has a wider scope in wills than in deeds, because in wills many words are capable of being used as equiva-

¹ *Doe v. Colyear*, 11 East. 548; *Goodright v. Wright*, 1 P. Wms. 397.

lents of "heirs," or "heirs of the body," such as "issue," "children," and the like, to which, when so construed, the rule equally applies. Also in wills the limitation to the heirs of the body is sometimes implied, as on a devise to *A.* for life with a devise over upon failure of heirs of his body.

WILLIAMS, *REAL PROP.* (17th ed.), 398. We have seen that, according to feudal law, the grantee of an hereditary fief was considered as being entitled during personal enjoyment only, that is, for his life; while his heir was regarded as having been endowed with a substantial interest in the land. And these conceptions seem to have been imported into English law along with the principle of tenure. In early times after the Conquest, therefore, if a grant of land were made to a man and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee-simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out. . . . A tenant in fee-simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift, expressly in these terms, "To *A.* for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to *A.* and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose

of satisfying the debts of the present tenant, the same rule still holds; and a grant to *A.* for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner a grant to *A.* for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to *A.* and to his heirs, or to *A.* and the heirs of his body, the words *heirs* and *heirs of his body* are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee. At the present day, when the heir is perhaps the last person likely to get the estate, those words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee-simple. And the circumstance, that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery.

Id., 407. The rule in *Shelley's Case* . . . is still in force in many of the States as a part of the common law. See *Siceloff v. Redman's Adm.*, 26 Ind., 251, 259, 260 . . . *Hileman v. Bonslaugh*, 13 Pa. St. 344. In the last cited case the rule is thus defended by Gibson, Ch. J.: It "ill deserves," he says, "the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism or a part of the rubbish of the dark ages. It is a part of a system, an artificial one, it is true, but still a system, and a complete one. The use of it, while fiefs were predominant, was to secure the fruits of the tenure by pre-

venting the ancestor from passing the estate to the heir, as a purchaser, through a chasm in the descent disencumbered of the burdens incident to it as an inheritance; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield ascribe it to concomitant objects of more or less value at this day; among them, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the handmaid not only of *Taltarum's Case*, but of our statute for barring entails by a deed acknowledged in court; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished, even by the legislature; and Mr. Hargrave shows in one of his tracts that to engraft purchase on descent would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. It is admitted that the rule subverts a particular intention in, perhaps, every instance; for, as was said in *Roe v. Bedford*, 4 Maule & Selw. 363, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee; and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession, than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated

from it without breaking the ligament of property. It prevails in Maryland, Georgia, Tennessee, as well as, perhaps, in most of the other States; and it prevailed in New York till it was abolished by statute. We have no such statute, and it has always been recognized by this court as a rule of property." . . . In many and, probably, in most of the States, the rule is not looked upon with the same favor. Thus, in *Siceloff v. Redman's Adm.*, cited *supra*, the Supreme Court of Indiana, speaking through Elliot, J., says: "The rule in *Shelley's Case* is a rule of the common law, and as the common law has been adopted in this State by statute, the rule is binding upon the courts as a law of real property in Indiana. It may be remarked that whatever reasons may have once existed for it in England have, even there, long since ceased, and no good reason is perceived for its incorporation into the legal policy of this country. It was doubtless introduced into many of the other States, as into this, as a part of the common law, without discussion or question as to its propriety, but it has been abrogated in many of them by statute, especially in its application to devises. . . . Its propriety as a rule of law, in this State, is seriously doubted, and it may be regretted that the attention of the legislature has not been directed to the propriety of its repeal, as its only effect, and more particularly in its application to devises, is to defeat the real intention of testators." . . . In *Belslay v. Engel*, 107 Ill. 182, 186, the Supreme Court, speaking through Justice Scott, says: The rule in *Shelley's Case* "is, at most, a technical rule of construction, and has always, since the decision in *Perrin v. Blake*, 4 Burr. 2579, given way to the clear intention of the testator or donor, when that intention could be ascertained from the instrument in which the words supposed to be words of limitation were used. This rule will control, unless where it contravenes some settled principle of law, otherwise, instead of being a rule by which justice could be administered, it would be a source of incalculable mischief in its practical application."

That the rule is not regarded with favor in this country is further apparent in that it has been abolished by statute in many of the States. It has been abolished in California (Cal. Civ. Code, 1886, sec. 779), Connecticut (Gen. Stat., 1888, sec. 2953), Dakota (Comp. Laws, 1887, sec. 2752), Kentucky (Gen. Stat. of Ky., Bullitt & Feland, chap. 63, art. 1, sec. 10; see, also, *Truman v. White's Heirs*, 4 B. Monr. 560, 570), Massachusetts (Pub. Stat., 1882, chap. 126, sec. 4), Michigan (2 Howell's Ann. Stat. sec. 5544), Minnesota (Kelly's Stat. 1891, sec. 3984), Mississippi (Ann. Code, 1892, sec. 2446), New York (1 R. S. 725, sec. 28; 8th ed., vol. 4, p. 2433, sec. 28), Virginia (Code, 1887, sec. 2423), West Virginia (Code, 1891, chap. 71, sec. 11), Wisconsin (Ann. Stat. Sanborn & Berryman, sec. 2052), and, probably, in other States. The rule has been abolished in the case of *wills* only in Kansas (Gen. Stat., 1889, sec. 7256), New Hampshire (Pub. Stat., chap. 186, sec. 8), New Jersey (Rev. of 1877, *Descent*, sec. 10), Ohio (R. S. Giaque's ed., 1890, sec. 5968) and Oregon (2 Hill's Ann. Laws, sec. 3093).—*Hutchins' note*.

N. Y. REAL PROP. LAW, § 44. Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate are the heirs or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them.

CHAPTER IV.

OTHER FUTURE INTERESTS.

(a) *Rights of Entry.*

LIT., § 351. But in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, etc., there the feoffor hath not the freehold before his entrie, etc.

Co. LIT., 265, a. Note, that *jus*, or right, in generall signification includeth not onely a right for the which a writ of right doth lie, but also any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry.

LEAKE, LAND LAW, 59. A right of entry was not assignable at common law by deed, nor by will; though it might be released to the person in actual seisin of the freehold; and if not so released it descended to the heir. A right of entry, whether immediate or future, and whether vested or contingent, may now be disposed of by deed, 8 & 9 Vict., c. 106, s. 6; and may be devised by will, 1 Vict., c. 26, s. 3; and will descend in the same manner as the land, if recovered, would descend, 3 & 4 W. 4, c. 106, ss. 1, 2.

1 SHARS. & B., LEAD. CAS., 141. A forfeiture may be taken advantage of by the grantor and his heirs . . . and the heir need not be expressly named in the instrument creating the condition to entitle him to take advantage of a breach thereof, occurring either in the lifetime of the grantor or after his death . . . and to have any effect upon the estate the condition must be taken advantage of by those to whom the right so to do belongs; and it may be stated as a general rule that with the breach of a condition a stranger

has nothing to do, and a court will not examine at his request, or in a collateral proceeding, the question whether a condition has been broken and a forfeiture incurred.

* * * * *

The right to take advantage of a condition cannot be conveyed so as to give the assignee a right to enforce it, but the conveyance will be so far effective that it will destroy the right of the grantor to enforce it, thus practically destroying the condition . . . (*Rice v. Boston and Worcester R. R.*, 12 Allen, 141); and the effect is not altered by the fact that the person to whom the conveyance was made is the same who could subsequently have claimed the condition as heir of the grantor (*Rice v. R. R.*, *supra*); nor, it seems, is the case different where the conveyance is by force of law, as one made under an insolvent act. *Stearns v. Harris*, 8 Allen, 597. A devisee of a condition cannot take advantage of it . . . except where a condition is rendered devisable by statute.

Id., 150. A question has sometimes been made as to what estate the grantor after re-entry for forfeiture is possessed of; and the better opinion seems to be that he is seised as of his original estate. It is true that this position is denied by Ruggles, C. J., in the course of his interesting and instructive opinion in *De Peyster v. Michael*, 6 N. Y., 467. Speaking of the right of re-entry, the learned judge says: "It is not a reversion, nor is it the possibility of a reversion, nor is it any estate in the land. It is a mere right or chose in action, and if enforced the grantor would be in by the forfeiture of a condition and not by reverter."

The current of authority is, however, the other way. Coke, 202, *a*, says: "Regularly it is true that he that entereth for a condition broken, shall be seised in his first estate or of that estate which he had at the time of the estate made upon condition," and states certain exceptions to the rule on account of impossibility, as where the reverter is to one seised in right of a wife who has died before breach—of necessity, as where a *cestui que use* prior to the Statute

of Uses had made a feoffment and had entered for condition broken—or with regard to certain collateral qualities. This is recognized as the law on this side of the Atlantic in *The Proprietors of the Church in Brattle Street v. Grant*, 3 Gray, 142. Bigelow, J., said: "A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor." . . .

It follows from the above position that any lien upon or right obtained by a third party in an estate held subject to a condition will be destroyed upon a re-entry by the grantor for a breach of condition; and a grantor is under no obligation to regard any supposed rights which a creditor of the grantee has acquired in the conditional estate. Thus in a case where, in April, 1857, a creditor of the grantee of an estate on condition made a levy on the estate, and in May of the same year the grantor formally entered for condition broken, and in 1859 took actual possession of the premises, it was held that there being no evidence of collusion between the grantor and grantee, the creditor acquired no right as against the former. *Thomas v. Record*, 47 Me. 500.

12 N. Y. REP., 121. A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by 32 Henry VIII., ch. 34; and similar enactments have been made in several of the States. In this State these provisions will be found at 1 R. S. 748, secs. 23, 24 and 25, and are limited to grants

or leases in fee reserving rents, and to leases for lives and for years. As to other grants upon condition, the common law is unchanged. 2 Kent, 123.

There was a reason for the statutory change in the particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter. In the cases of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rents reserved, and in the cases of leases for lives and years, he has an actual reversion of what remains after the expiration of the particular estates. In these cases, therefore, he has a vested interest, and may well be permitted to assign with it, and his assignee to take with such interest his right of entry for non-performance of a condition subsequent; for the right to enforce a forfeiture is necessary to the collection of the rents and to the protection and enjoyment of the reversion. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said such possibilities were assignable in equity; but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent, Com. 130): "A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent," and the chancellor acted upon that rule in *Livingston v. Stickles*, 8 Paige, 398.

All contingent and executory interests were assignable in equity, and would be enforced if made for a valuable consideration. 4 Kent, 269. But these words had an ascertained legal signification; and it was never claimed that they were applicable to a case like that under consideration. It will hardly be pretended that Dederer's possibility of reverter was a contingent or an executory interest, in the legal sense of these words.

By the Revised Statutes (1 R. S. 725, sec. 35), expectant

estates are descendible, devisable and alienable, in the same manner as estates in possession; and it is claimed that Dederer had an expectant estate. But we are relieved from all doubt on this point, by the fact that the statute itself has furnished the definition of the term "expectant estates." They are described (1 R. S. 723, sec. 9) as including future estates and reversions; and these expressions are also defined in secs. 10 and 12. A future estate is one limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. And by sec. 13 a future estate is said to be vested, where there are persons in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; and "contingent," whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. A reversion is defined as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of the particular estate granted or devised. I have been thus particular in transcribing these statutory definitions of "expectant estates," to show, what is apparent, that they are not in the least applicable to the case under consideration. Though, as Chancellor Walworth said in 7 Paige, 76: "They include every present right and interest, either vested or contingent, which may by possibility vest at a future day," yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living. The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which, before, were only assignable in equity. They are now assignable at law as well as in equity.

Kent says (4 Com., 370), that the grantor of an estate upon

condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says: "There is only the possibility of reverter left in the grantor and not an actual estate," citing *Martin v. Strahan*, 5 Term R. 107, note. For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent., Com. 262, note *b*, and *Jackson v. Waldron*, 13 Wendell, 178, and *Fortescue v. Satterthwaite*, 1 Iredell, N. C., R. 570.—*Per* Parker, J., in *Nicoll v. N. Y. & E. R. R. Co.* (1854).

(*b*) *Possibilities of Reverter.*

FEARNE, REM., 381. It is generally understood that lands were granted originally for the life only of the grantee, then to him and his lineal heirs, and then to him and his lineal and collateral heirs: and that on every such grant, whether it were for life, or in fee, a right remained in the grantor to the services of the grantee, during the continuance of his estate, and to a return of the land, on its expiration. Whether this right of the grantor depended on an estate for life, or in fee, it was of the same nature, and indifferently called his *Reverter* or *Escheat*; but, from the remoter probability of the return, when the fee was granted, it became customary to call it after a grant of the fee his *Possibility of Reverter*; by degrees that expression was applied to those cases only where a limited fee had been granted, and the word *escheat* was applied to those where the grant had conferred an absolute estate in fee simple. A grant to a man and the heirs of his body was at common law a limited fee; and therefore, after such a grant, a possibility of reverter was said to remain in the grantor. When the statute *De Donis* converted such fees into estates tail, the return of the land was secured by it to the donor, and was called his reverter. In all these cases the words *reverter* and *reversion* are synonymous.—*Butler's note.*

GRAY, PERPETUITIES, § 13. *Possibilities of Reverter*.—Some estates were terminable by special or collateral limitations; for instance, an estate to *A.* till *B.* returned from Rome; or an estate to *A.* and his heirs until they ceased to be tenants of the Manor of Dale. On the happening of the contingency, the grantor was in of his old estate without entry. The estate was not cut short, as it would have been by entry for breach of condition, but expired by the terms of its original limitation. After a life estate of this kind a remainder could be limited. After a fee there could be no remainder; but there was a so-called possibility of reverter to the feoffor and his heirs which was not alienable.

§ 31. These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute *Quia Emptores* put an end to tenure between the grantor of an estate in fee simple and the grantee. Therefore, since the statute, there can be no possibility of reverter remaining in the grantor upon the conveyance of a fee; or, in other words, since the statute there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid. The distinction between a right of entry for condition broken and a possibility of reverter is this: after the statute, a feoffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest—a returning of the land to the lord of whom it was held, because the tenant's estate had determined.

§ 32. In accordance with the doctrine of the foregoing section, no possibility of reverter after a qualified fee

has been sustained in England since the Statute *Quia Emptores*.

§ 38. In Pennsylvania (if *Wallace v. Harmstad*¹ is unsound) and in South Carolina tenure exists and the Statute *Quia Emptores* is [not] in force. In these States, therefore, apart from the question of remoteness, qualified fees may be valid. In *Scheetz v. Fitzwater*,² *Penn. R. R. Co. v. Parke*,³ and *Henderson v. Hunter*,⁴ it was assumed that fees simple determinable might be created.

§ 39. In the other States there is either no tenure at all or, where there is tenure, there is no good reason to doubt the existence of the Statute *Quia Emptores*. In neither case can there be any possibility of reverter. As in England, so in the United States, there are, however, several cases which speak of such interests as possible.

§ 40. *Leonard v. Burr*.⁵ Devise to *A.* of the use of land until Gloversville was incorporated into a village, and then to the trustees of said Gloversville. The Court of Appeals held that the devise over to the trustees was void, and that *A.* took a determinable fee. The precise point was passed upon, because if *A.* took a fee simple subject to a void executory devise, he would have an absolute estate, whereas it was held that on the incorporation of Gloversville the land reverted to the grantor's heirs. This is the only reported decision (outside of Pennsylvania) of the highest court of any State distinctly based on the existence of a possibility of reverter. It is submitted that the decision was incorrect, and that in truth there was a devise to *A.* in fee, subject to a bad executory devise, and that therefore *A.* took a fee simple absolute.

§ 41. From the foregoing examination of the authorities it appears that *Leonard v. Burr* is the only weighty case reported on either side of the Atlantic, since the passage of the Statute of *Quia Emptores*, in which the validity of a possibility of reverter has been clearly adjudicated.

¹ 44 Pa. 492.

² 5 Pa. 126.

³ 42 Pa. 31.

⁴ 59 Pa. 335.

⁵ 18 N. Y. 96.

The question may naturally arise, Why inquire so curiously as to the validity of a common-law possibility of reverter, since by a shifting use or an executory devise to the grantor the same result can be reached? The answer is: Shifting uses and executory devises are, past a doubt, subject to the Rule against Perpetuities; but it is not universally agreed that possibilities of reverter are so. Therefore, if this latter class of interests are valid, and are not subject to the objection of remoteness, interests may, by means of them, be created in a grantor and his heirs, which may not come into possession for centuries. It is submitted that theory and policy alike agree in denying the existence at the present day of such possibilities of reverter, and that the allusions to them as actual rights in the books are outweighed by the fact of their non-appearance in practice.

(c) *Escheat.*

GLANVILL, VII., c. 17. The ultimate heir of a free-holder is his lord. When, therefore, any one dies without an ascertained heir, as, for instance, without a son or a daughter, or without any person who is unquestionably the next and rightful heir, the lord may and usually does take into his hands that fee as an escheat and retain it, whether the lord be the king or another.

I EDEN, 227. This brings me to consider the nature of this right by escheat. It has been truly said in the beginning of feodal tenure this right was a strict reversion. The grant determined by failure of heirs, the land returned as it did upon the expiration of any less temporary interest. It was no fruit, but the extinction of tenure (as Mr. Justice Wright says), it was the fee returned.

This holds equally, whether the investiture was to general or special heirs; for, originally, by the feudal law, the tenant could not alien in any case without the lord's concur-

rence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what, in point of law, amounted to a consent to a new investiture or change of his vassal. This is the meaning of the distinction taken in the books, which mention that nothing escheats where the tenant is in by title. Any man in possession, by being tenant to the lord, could not strip him of the reversion. Hence it followed that the land returned in the state in which it was granted free from incumbrances.

As soon as a liberty of alienation was allowed without the lord's consent, this right changed its name. It became a sort of caducary succession. Thence the lord was called *tanquam haeres*; *Craig, L. 2, c. 2, s. 12-15*. Lord takes as *ultimus haeres, &c.* The resemblance of the lord's right by escheat to the heir's by descent does not hold throughout; and therefore the lord by escheat is, in *Co. Litt.* 215, *b*, with accuracy considered as assign in law. He took no possibility, or condition, or right of action, which could not be granted. He could not elect to avoid voidable acts, as feoffment of an infant with livery. But every right preserved to the heirs which could be granted goes to the lord by escheat. As if tenant makes lease for life, reserving rent to him and his heirs, the rent will go to the lord as well as the inheritance.—*Per Lord Mansfield, in Burgess v. Wheate (1759).*

2 POLL. & MAIT., HIST. ENG. LAW, 22. If an estate in "fee conditional" came to an end, then the land would go back to the donor. We have seen that the king's court did something towards making this an uncommon event, for the tenant, so soon as issue of the prescribed class had been born to him, might if he pleased defeat the donor's claim by an alienation. Still, even when this rule had been established, such an estate would sometimes expire and then the land would return to the donor; it would "revert" or "escheat" to the donor and lord. Now, in later days, when the great statutes of Edward I. had stopped subinfeudation and defined the nature of an estate tail, no blunder could have

been worse than that of confusing a reversion with an escheat. These two terms had undergone specification: land "escheated" to the lord *propter defectum tenentis* when a tenant in fee simple died without heirs, and the lord in this case could hardly ever be the donor from whom that tenant acquired his estate; while, on the other hand, on the death of a tenant for life, or the death without issue of a tenant in tail, land "reverted" to the donor who had created that tenant's estate. But at an earlier time there was not this striking contrast. In the common case, so long as subinfeudation was permissible, the tenant in "fee-simple absolute," just like the tenant in "fee conditional," held of his donor. If the heirs of the one or the heirs of the body of the other fail, the land goes back to one who is both lord and giver. The two cases have very much in common, and the words "revert" and "escheat" are sometimes indiscriminately used to cover both. According to the orthodoxy of a later age, what the donor has when he has created a conditional fee is not a reversion but a "possibility of reverter." Whether the lawyers of 1285 had come in sight of this subtle distinction we may doubt, without hinting for a moment that it is not now-a-days well established. . . .

DIGBY, HIST. REAL PROP., Ch. X., § 3 (1). If in the case of freehold lands there is a total failure of heirs on the death of the tenant, the land escheats to the lord. The theory of title by escheat is that the whole property in the land being, as has been said, divided between the lords (paramount and mesne) and the tenant, on the tenant failing to have any heirs to whom the lands can descend, there is a species of reversion to the next lord. His right over the land becomes as it were enlarged by the failure of the tenants in possession. But this title must be completed by entry on the land, or otherwise asserting his right.

GRAY, PERPETUITIES, § 44. The effect of the Statute *Quia Emptores* on the right of escheat was, of course, to

give that right to the grantor's lord. It is said by Lord Coke that "if land holden of *I. S.* be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat. And so if land be given in fee-simple to a deane and chapter, or to a mayor and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate." This statement has been often repeated as law, and has proved a sore stumbling-block to courts and writers in this country. Being unwilling to follow it, they have been constrained to call it "obsolete" or "unsuited to our institutions."

§ 50. But the notions which Lord Coke imposed upon his brethren did not always long survive his retirement. In *Johnson v. Norway* (1622) arose the precise question whether, on the dissolution of a corporation, its land went to the donor or escheated to the lord. Hobart, C. J., said: "The great doubt of the case will be upon the barre of the defendant, whether by the death of the abbot and the monks the land escheat to the lords of whom that was holden, or whether that shall go to the donors, and to the founders, and he thought that the land shall escheat, to which Winch seemed to agree." The report adds that the judges said they would advise of the case, and gave order to argue it again; but Lord Hale's MSS. say that it was held that the land escheated. This is the only case in which the question has been decided.

§ 51. But although Lord Coke's doctrine rests solely on a *dictum* of a judge in the fifteenth century, and is contrary to the only decided case, it has often been referred to as law. No decision, however, has ever followed it, and it is probably one of those *decantata* which when carefully examined will be found not only "odious and obsolete," but in fact to have never been law at all.

B. STATUTORY OR MODERN ESTATES.

I. Legal Estates.

CHAPTER I.

EXECUTORY USES.

DIGBY, HIST. REAL PROP., Ch. VI. (3). Interests in lands, too, might be created by way of use to commence and terminate at times and in ways which the doctrines of the common law would not permit. It has already been seen that where one person desired to convey lands to another at common law, he must do so either by feoffment with livery of seisin, which was the regular mode of transfer, or by the fictitious processes of fine or recovery, or by conveying a particular estate by lease for years and entry, or by lease for life with livery of seisin followed by a release of the reversion to the lessee, or by a grant of the reversion to a third person, in which latter case the lessee for years must attorn to the grantee of the reversion in order to give complete effect to the grant. The foundation of all these modes of conveying interests in lands was open and notorious transfer of possession; the point at which the freehold interest passed out of the grantor and vested in the grantee was marked by an actual change of possession (unless indeed the grantee was already in actual possession), or, in the case of a fine or recovery, by an acknowledgment in open court. Thus it was that freehold interests to take effect in possession or enjoyment at a future time could only be created by way of remainder. . . . No such rule, however, restricted the freedom of the Chancellor in enforce-

ing uses. There was no reason why the intention of the donor should not be carried into effect at a future period. Thus a feoffment to *A.* and his heirs, and after next Christmas to the use of *B.* and his heirs, would be carried out according to the expressed intention of the donor. So a use might be raised on the happening of any future event, or the expiration of any specified time. Thus, while at common law, as has been pointed out, a fee could not be limited after a fee, this might in effect be done with the use. A conveyance to *A.* and his heirs so long as he continued unmarried, and upon his marriage to the use of *B.* and his heirs, would cause the use upon the happening of the event to arise and spring up and vest in *B.*; in other words, *A.*, upon his marriage, while remaining legal owner, would be constrained by the Chancellor to hold to the use of *B.* Thus a power was acquired of creating future interests in lands and of causing interests in lands to be shifted and to pass from one person to another, which was unknown to the common law, and which gave rise to the complicated system of conveyancing which prevails at the present day.

Id., Ch. VII., § 2. It has been shown . . . that before the Statute the Chancellor was in the habit of enforcing uses created so as to arise at a future time. Such limitations now became effectual also at law, and conveyances were thus enabled to introduce limitations of much greater complication, in dealing with the legal estate, than was possible at common law.

* * * * *

The above instances may suffice to suggest a distinction which is usually made between what are called (1) *shifting uses*, (2) *springing uses*, (3) *future or contingent uses*, or, more properly, uses limited to take effect as remainders.

The distinction between the first two of the above classes has in the history of the law been of less importance than the distinction between those two classes and the third.

A *shifting use* is where a use has been properly created, and then upon the happening of some specified event the interest first created passes away from the person enjoying it, and vests, partially or wholly, in some other person. For instance, if lands are given to *A.* and his heirs to the use of *B.* and his heirs, but if *B.* die in the lifetime of *A.* then to the use of *C.* and his heirs. Upon the death of *B.* in *A.*'s lifetime the use is said to shift to *C.* Again, a provision is often made by way of the creation of a shifting use for an estate shifting away from the person to whom it is first given to some other member of the family on the acquisition of some other estate. Thus by the aid of shifting uses the old rules as to the creation of future estates by way of remainder may be evaded, a future freehold interest can since the Statute be created by way of shifting use to take effect without waiting for the determination of a particular estate, and an estate in fee simple can by the same method be made to pass from one person to another. Nor can any alienation or disposition of the lands by the first *cestui que use* affect the interest of the person who, upon the happening of the specified contingency, is entitled to the use of the lands.

Springing uses differ from shifting uses merely in the fact of their arising by virtue of the mode of their creation as new uses, and not operating by way of shifting of a use already created from one person to another.¹

* * * * * *

¹ Examples of springing uses occur—upon a bargain and sale to another after seven years, or after the death of the bargainor, or upon any other specified future event. Also upon a covenant to stand seised to the use of another, after the covenantor's death, or to the use of the heirs or heirs of the body of another after his death. So upon a conveyance operating to transfer the legal estate, with a declaration of the use to *A.* and his heirs after four years, or after the death of the grantor, or to the use of the heirs of *A.*, after the death of *A.*, such uses are good springing uses. But though the uses are deferred, the conveyance of the seisin to serve the uses must be immediate, because a freehold cannot be conveyed *in futuro* by any mode of conveyance operating only at common law.—*Leake, Land Law*, 350.

Future or contingent uses, or, as they might be called, uses limited as remainders, present somewhat different features, though the importance of the distinction is much diminished by the recent Act 40 and 41 Vict., c. 33. By a series of decisions a rule was established that if a limitation could be regarded as a remainder it should not be regarded as a springing or shifting use. Nor was this rule affected by the consideration that the use might be void if the stringent requirements which the common law demanded in the case of contingent remainders were not complied with. Thus, if it unfortunately happened that the conveyancer, in drawing the deed, expressed the conditions on which the future use was to arise in such a way that the future estate could be construed as a remainder, and if, at the same time, such remainder was contrary to the old common law rules affecting remainders, which had long ceased to be founded on any substantial reason, the future interest was invalid in consequence of this defect in point of law. For instance, if a conveyance was made to *B.* and his heirs to the use of *A.* for 10 years, remainder to the use of the heirs of *J. S.*, the remainder was void, being a contingent remainder limited upon an estate for years. The fact that if the limitation did not happen to fall within the definition of a remainder, it might be good as a springing use, was utterly disregarded. Perhaps in no point was the extreme technicality of the rules relating to uses more conspicuous. A partial remedy for this injustice in the case of contingent remainders created by instruments executed after August 2, 1877, has been provided by the Statute 40 and 41 Vict., c. 33, by which it is provided that every contingent remainder . . . in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, *in the event of the particular estate determining before the contingent remainder vests*, be capable of taking effect in all respects as if the contingent remainder had originally been created as a

springing or shifting use or executory devise or other executory limitation.

SUG. GILB. USES, 176. The result of the authorities seems to be that to create a good springing use it must be limited at once independently of any preceding estate, and not by way of remainder, for, if it be, it shall be construed a contingent, and not a springing use, and shall be subject to the laws which govern contingent remainders. By a train of decisions springing uses are thus confined within very narrow limits, and future or contingent uses are placed on exactly the same footing with contingent remainders.—*Sugden's note.*

GRAY, PERPETUITIES, § 58. *Is a Contingent Use good although preceded by an Estate for Years?* In two cases, *Adams v. Savage*¹ (1703), and *Rawley v. Holland*² (1712), it was held that a use limited after an estate for years to a person not *in esse*, was bad as a contingent remainder unsupported by a freehold.

§ 59. The soundness of these two decisions is very questionable. It is well settled that if a future limitation can be construed as a remainder it must be so construed, and not as a springing use; but it is a very different thing to say that a good springing use must be construed into a bad remainder, because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder, if it can be a remainder, is one thing; but to insist upon construing it as a remainder, when it cannot be a remainder, seems the very wantonness of destruction. In fact, an estate after an estate for years, though commonly called a remainder, is not strictly so; a remainder is an estate after a freehold; a remainder-man, so called, after an estate for years, has the present seisin, and the reason why at common law an estate cannot be given to a person not

¹ 2 Ld. Raym. 854; 2 Salk. 679.

² 22 Vin. Ab. 189; 2 Eq. Cas. Ab. 753.

in esse after an estate for years is, that there is no one to take the present seisin, and that a freehold cannot be granted *in futuro*. But, by way of use, a freehold can be granted *in futuro*.

§ 60. The cases of *Adams v. Savage* and *Rawley v. Holland* have, accordingly, been much criticised. But, further, they must be considered as overruled by cases in which it has been repeatedly held that a future contingent devise after an estate for years is a good executory devise, and not a bad remainder.¹ There is no intelligible distinction in this respect between springing uses and springing executory devises, and if *Adams v. Savage* and *Rawley v. Holland* have not been formally overruled, it is in all probability because the question has not arisen under a deed, as it has under wills. The statement may therefore be ventured that *a contingent use is good although preceded by an estate for years*.

¹ *Gore v. Gore*, 2 P. Wms. 28 (1722).

CHAPTER II.

EXECUTORY DEVISES.

2 BL. COM., 172-175. An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do, if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in praesenti*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to *A.* and his heirs; but if he dies before the age of twenty-one, then to *B.* and his heirs; this remainder, though void in deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors: because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation), estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise.

3. By executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life-estate being esteemed of a higher and larger nature than any term of years. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place: for

the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards it was held that the devisee for life hath no power of aliening the term, so as to bar the remainderman: yet, in order to prevent the danger of perpetuities, it was settled that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainderman who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.

Id., 175. A future estate will always be construed to be a remainder when it can be, in preference to a springing use or executory devise. The reason is an obvious one: in the latter case the future estate cannot be barred, and the land is completely withdrawn from commerce. So between remainders the law favors their vesting, because that combines the interests of a free commerce in land with the rights of the proprietors. . . . It is an inflexible rule that no limitation shall be deemed an executory devise if it may by any practicable construction be sustained as a contingent remainder: for the all-sufficient reason that these executory devises, being inconsistent with the policy of the common law, which, on account of its abhorrence of estates commencing *in futuro*, requires all the precedent parts of the fee to pass out of the grantor at the same instant, are barely tolerated, and only in favour of the explicit declaration of one who may have been compelled to dispose of his estates when unassisted by counsel. They are, therefore, to be sustained only in cases of clear necessity.—*Sharswood's note*.

FEARNE, REM., 382-386. An executory devise is defined to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon

some future contingency. This is the definition commonly given of an executory devise. It comprehends indeed every species of an executory devise; but at the same time it is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise (for every contingent interest must necessarily be future); now every contingent interest in lands limited by devise is not an executory devise, for some contingent interests by devise are contingent remainders; therefore, such a definition must be considered as defective in point of precision and accuracy. An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise as to fall within the rules above laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder.

LEAKE, LAND LAW, 68. A disposition by will, equally with a disposition by deed, is subject to the general rules of the common law regulating the estates or interests which may be given. A testator can only devise such estates as are known to the law, nor can he alter or take away the legal incidents and qualities of such estates; for instance, he cannot render estates of inheritance inalienable, nor alter the law of inheritance.

But the power of disposition by will, being derived directly from the statute, is for the most part independent of the restrictions imposed by the peculiar feudal doctrines of the common law, and by the common law forms of conveyance. Devises of freehold estates were operative without livery of seisin, and without attornment, before these formalities were dispensed with by statute. Devises of freehold estates may be made to take effect *in futuro*, at a fu-

ture date or upon any specified event, leaving the inheritance in the meantime to descend to the heir; or such devises may be made to take effect in defeasance of and in substitution for preceding devises; although such limitations of estates are contrary to the rules of the common law, which admit no future limitations or substitutions of the tenancy, except by way of remainders. These future devises are analogous to the springing and shifting uses which became legal limitations under the Statute of Uses, and they are called distinctively *executory* devises.

Id., 360. An executory devise being the limitation by will of a future estate or interest in land, which cannot take effect as a remainder, it follows that "every devise of a future interest which is *not preceded* by an estate of freehold created by the same will, or which, *being so preceded*, is limited to take effect *before* or *after* and *not at the expiration* of such prior estate of freehold is an executory devise."¹

¹ 1 Jarman on Wills, 778.

CHAPTER III.

STATUTORY FUTURE ESTATES.

4 KENT COM., 271. The New York statute has, in effect, destroyed all distinction between contingent remainders and executory devises. They are equally future or expectant estates, subject to the same provisions, and may be equally created by grant or by will. The statute¹ allows a freehold estate, as well as a chattel real, to be created to commence at a future day; and an estate for life to be created in a term for years, and a remainder limited thereon; and a remainder of a freehold or chattel real, either contingent or vested, to be created expectant on the determination of a term for years; and a fee to be limited on a fee, upon a contingency. There does not appear, therefore, to be any real distinction left subsisting between contingent remainders and executory devises. They are so perfectly assimilated, that the latter may be considered as reduced substantially to the same class; and they both come under the general denomination of expectant estates. Every species of future limitation is brought within the same definition and control. Uses being also abolished by the same code,² all expectant estates, in the shape of springing, shifting, or secondary uses, created by conveyances to uses, are, in effect, become contingent remainders, and subject precisely to the same rules.

GRAY, PERPETUITIES, § 67. In several of the United States freehold estates may be created *in futuro* either by express provision of statute or by inference from statutes

¹ New York Revised Statutes, Vol. I., 724, sec. 24.

² *Ibid.*, Vol. I., 727, sec. 45.

dispensing with the necessity of livery of seisin. And although in several of the States (*e.g.*, New York, Michigan, and Wisconsin) uses have been abolished, which of itself would greatly limit the creation of estates *in futuro*, yet wherever this has been done it is believed that freehold estates can, by statute, be created *in futuro* so that the abolition of uses occasions no practical inconvenience.

§ 68. The only possible exception to this is Ohio. The Statute of Uses is not in force in that State, and it has never been expressly enacted that freeholds can be created *in futuro*. But land passes there by deed without livery of seisin, and the courts of Ohio will not improbably hold, as have those of Maine and Vermont, that when livery of seisin is no longer necessary the objection to the creation of a freehold *in futuro* falls with it.

N. Y. REAL PROP. LAW, § 40. Subject to the provisions of this article, a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.

§ 43. A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation.

CHAPTER IV.

POWERS.

Co. Lit., 237, a. Lastly, somewhat were necessarie to be spoken concerning clauses of provisoes, containing power of revocation, which since *Littleton* wrote are crept into voluntarie conveyances, which passe by raising of uses, being executed by the statute of 27 H. 8 and are become verie frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sonnes, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himselfe for life, and after to the use of *Thomas* his eldest son in taile; and for default of such issue, to the use of his second son in taile, with divers like remainders over; with a proviso that it shall be lawfull for the covenantor at any time during his life to revoke any of the said uses, &c.: this proviso being coupled with an use, is allowed to be good, and not repugnant to the former states. But in case of a feoffment, or other conveyance, whereby the foeffee or grantee, &c., is in by the common law, such a proviso were merely repugnant and void. . . .

By the same conveyance that the old uses be revoked, may new be created or limited, where the former cease *ipso facto* by the revocation, without either entrie or claime.

SUGD. POW., II. Powers before the Statute of Uses were, as we have seen, mere directions to the trustee of the legal estate how to convey the estate; in truth they were future uses to be designated by the person to whom the power was given: these, when they arose, equity compelled the trustee

to observe; and when conveyances under the Statute of Uses became established, it was still usual to reserve or limit such powers, as the exigencies of the case required: thus, powers to lease, to sell, or exchange, to jointure, to charge with portions for younger children, or to revoke the settlement itself, soon became usual. . . .

DIGBY, HIST. REAL PROP., Ch. VII., § 2. One of the commonest modes of calling into operation the Statute of Uses is by the creation of what are called *powers of appointment*, that is, conferring on a person a power of disposing of an interest in lands quite irrespective of the fact whether or not he has any interest in the land himself. The creator or donor of the power in disposing of the lands makes a conveyance operative at common law, and at the same time declares that such and such uses are to arise on the execution of a proper instrument by a designated person. This is called technically giving to a person a *power of appointment*, and the instrument when executed operates as an *appointment*. The estate which passes under the power of appointment comes not from the donee of the power, but from the original settlor; the only difference between an interest thus created and an immediate conveyance being, that instead of the uses being declared by the original settlor at the time of the conveyance of the legal estate, it is left to a third person to declare them.

Thus it was common in ordinary purchase deeds of land, where the purchaser was married before Jan. 1, 1834,¹ to introduce provisions of this kind in order to bar effectually any claim to dower on the part of his widow. No estate of inheritance in possession was given to the purchaser at all, but he was invested with a power of disposing of the lands for any estate. This was effected by conveying the lands to *A.* and his heirs to such uses, etc., as *B.* (the purchaser) should appoint, and in default of and until appointment to

¹ When the Dower Act (3 & 4 Will. IV., c. 105) came into operation, by which a simpler method of barring dower was introduced.

the use of *B.* for life, remainder to the use of *A.* and his heirs during the life of *B.*, remainder to the use of *B.* and his heirs. Under these limitations *B.* never had more than an estate for life in possession, and therefore his widow's dower could not attach. At the same time, by exercising the power of appointment he could in effect convey an estate in fee simple to any other person.

HARDRES, 415. Powers to raise estates are either simply collateral (as where a party that has such power has not, nor ever had any estate in the land: as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is no more than a bare nomination) or not simply collateral: and these latter are of two sorts: first, appendant and annexed to the estate; secondly, in gross. A power of the first sort is, where tenant for life has a power to make leases for one and twenty years or three lives: such a power is not simply collateral. For if such a tenant charge the land with a rent, and then execute his power, the charge shall not be defeated whilst he lives. *Latche's Rep.* So if he had before covenanted to stand seised to the use of another; because the power in that case is annexed to the estate. But where the power does not fall within the estate, as here the tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross; because the estate for life has no concern in it. And yet such a power may by apt words be destroyed by release, or by a fine or feoffment, which carry away and include all things relating to the land. But an assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such a power, because it is a power in gross.—*Per Hale, C. B., in Edwards v. Sleater* (1666).

Co. Lit., 271, b. By a general power of appointment is understood that kind of power which enables the party to

appoint the estate to any persons he thinks proper; and, in this sense, it is opposed to a qualified or particular power, which enables the party to appoint to or among particular objects only; as a power of appointing to his children, or the children of any other person. A general power of appointment has no tendency to a perpetuity, as, from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely from every species of limitation inconsistent with that fee. In fact therefore giving a person such a power is nearly the same as giving him the absolute fee. The only difference is, that it enables him to do, through the medium of a seisin previously created, that which, if the fee had been actually limited to him, he might do by a conveyance of the land itself; so that in both cases his power of alienation is of the same extent. But, in the case of a particular or qualified power, where the objects are limited, the case is entirely different. The limitation of the objects takes the land out of commerce, and of course has a tendency to that perpetuity which the English law of real property does not admit. The consequence therefore is, and by a series of cases it now appears to be settled, that where the power is general, estates for life, with remainders over, may be limited under them to persons not *in esse* at the time of the execution of the original deed, in the same manner, and to the same extent, as if, instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent, and integral conveyance. On the other hand, in the case of a particular or qualified power, that is, where the objects are qualified, as a power of appointing to the children of the party himself, though perhaps it may enable him to appoint life estates to children unborn at the date of the deed creating the power; yet, if it enables him to appoint life estates to those children, it certainly does not authorize him to extend the appointment to the children of these children, so as to

make them take by purchase, nor to appoint any other estate, which might not have been created by the very deed creating the power. In all cases therefore of particular or qualified powers, both in the creation and the exercise of them, care should be taken to ascertain that the uses which the party is empowered to raise under them, or actually assumes to raise under them, when he comes to exercise the power, are such as the deed creating the power might itself have raised. . . .—*Butler's Note*, III., 4.

LEAKE, LAND LAW, 387. Powers in gross in a person having no estate in the land are distinguished into those which the donee of the power may exercise for his own benefit, and those which he can exercise for the benefit of others only, without any benefit to himself. The former partake of the nature of property or interest, and may therefore be released or extinguished by the donee of the power. An instance of this kind of power occurs where a person seised in fee settles his whole estate upon others, but reserves to himself a power of revocation. Such power is a power in gross and part of his old dominion; by revocation of the uses he would be restored to his former ownership; and it is therefore capable of being released and extinguished. So if the power of revocation be reserved to the heir of the settlor, because by the revocation the heir would be restored to the estate.

Id., 394. A devise to a person in terms importing that he may dispose of the property at his absolute discretion confers an estate in fee simple, or the entire interest, and not merely a power; but this construction does not apply to a conveyance by deed, in which such form of limitation would merely confer a power of appointment.

Id., 395. A devise to a person for life expressly, with remainder to such persons as he shall by deed or will or otherwise appoint, does not give him the absolute interest; although he may acquire it by an exercise of the power. So, a devise to a person for life, with remainder to his

"assigns," gives him a life estate with a general power of appointment over the remainder.

WILLIAMS, REAL PROP. (17th ed.), 462. In several of the States, as already suggested, the subject of powers is now regulated by statute. This is the case in New York, Michigan, Wisconsin, Minnesota and Dakota. In these States powers, except as authorized and provided for by statute, are abolished, and it is declared that the creation, construction and execution of powers shall be governed by the provisions of the statute. See 1 R. S. of N. Y., 732-738.
 . . . —*Hutchins' note.*

N. Y. REAL PROP. LAW, § 111. A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.

§ 113. A power, as authorized in this article, is either general or special, and either beneficial or in trust.

§ 114. A power is general where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.

§ 115. A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,

2. The power authorizes the transfer or encumbrance, by a conveyance, will, or charge, of any estate less than a fee.

§ 116. A general or special power is beneficial where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

§ 117. A general power is in trust, where any person or class of persons, other than the grantee of the power,

is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

§ 118. A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

§ 125. Where the grantor in a conveyance reserves to himself for his own benefit an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

§ 129. Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

§ 130. Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers, and encumbrancers.

§ 131. Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

§ 132. Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

§ 133. Every power of disposition by means of which

the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit is deemed absolute.

§ 139. A special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

§ 142. The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of the person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

§ 144. A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.

CHAPTER V.

PERPETUITIES.

HARG. LAW TR., 518. When executory devises were first permitted, it was foreseen that entails made in that form could not be barred by fines or recoveries. If they were of *real* estate, the extraordinary devisee could not be barred by fine; because the title of the executory devisee is not *through*, or as *privy* to the immediate taker, but quite independent of him; nor could the executory devisee be affected by a recovery, it being soon settled that the recompense, which in the supposition of law is the ground of barring the issue in tail and those in remainder and reversion, doth not extend to an executory devisee. If they were of *personal* estate, whether chattels real or personal, from the nature of the property they could not be the subject of either fine or recovery.

Entails by executory devise being thus exempt from any legal mode of barring them, it became necessary to prescribe bounds and limits to this new species of settlement, lest otherwise entails should obtain a longer duration through the irregular and barely permitted medium of executory devise, than the law endures, where the entail commences in the regular way by creating estates for life and estates tail with remainders over.

Hence originated the rule both at law and in equity, that the contingency, on which executory devises depend, should be confined to a stated period; and by analogy to the case of strict entails, which cannot be protected from fines and recoveries longer than the life of the tenant for life in possession, and the attainment of twenty-one by the first issue in tail, it was at length settled, that the longest period for vesting of an executory devise should be *any life or lives in*

being and twenty-one years after; to which may be added a few months more for the case of a posthumous child. Therefore every contingency, which is not such, that if it ever happens, it must necessarily be within the period so described, is too remote for an executory devise.

LEAKE, LAND LAW, 439-442. The limitation of future estates is subject to restrictions as to the time of taking effect, which differ according to the nature of the limitation, as operating by way of remainder, or by the way common to springing and shifting uses and executory devises.

The restrictions upon limitations by way of remainder have already been considered. They are, for the most part, involved in the dependence of the remainder upon the particular estate, requiring that it must become vested in interest pending that estate, so as to take effect in possession immediately upon its determination. The limitation of remainders is further restricted by the positive rule that (though they may be limited to the unborn child of a living person) they cannot be limited to the issue of a person unborn.

The particular estate supporting a remainder may be an estate for life or in tail, and an estate tail may endure throughout indefinite generations of issue; but the tenant in tail in possession for the time being, when of full age, has the power, by means of a disentailing assurance, to acquire or convey an estate in fee-simple discharged of all remainders. Therefore, the limitation in remainder after an estate tail remains effectual only during the minority of the tenant in tail; and if the estate tail be preceded by an estate or estates for life, as in an ordinary settlement of land, the limitations in remainder, though valid in creation, cannot be made effectual in operation beyond the lives of the tenants for life and twenty-one years, the possible minority of the tenant in tail.

On the other hand, limitations by way of springing use and executory devise arise and take effect according to the

terms of limitation independently of the preceding estates, which they supersede and defeat; consequently there are no restrictions inherent in the nature of such limitations as there are in remainders. If limited after or in defeasance of an estate tail they may be discharged or destroyed by the disentailing assurance of the tenant in tail; but a tenant in fee simple cannot by any means destroy or get rid of the executory limitations of this kind which may operate upon his estate. Therefore, except where preceded by an estate tail, these limitations require a special rule of restriction; otherwise they might be employed in a manner to restrain the alienation of the land for an indefinite period or in *perpetuity*.

A rule has accordingly become established by judicial decisions, founded chiefly on analogy to the limits of a settlement at common law by way of particular estates and remainders, that limitations by way of springing or shifting use or executory devise must take effect within the period of a life or lives in being at the time of creating the limitations and twenty-one years afterwards. This rule is known as *the rule against perpetuities*. A limitation which infringes the rule is void of effect; but it is not therefore to be taken as struck out of the will or deed altogether; it may be read as part of the context for all purposes of construction, as if no such rule existed. The lives of any persons and of any number of persons, though wholly unconnected with the limitations in point of interest, may be taken for the measure of the period. Also a term of twenty-one years independent of any estate limited, or of the infancy of any person taking an estate or interest. If lives be not selected as part of the period restrictive of the limitation the rule imports that it must take effect within twenty-one years.

As a child *in ventre sa mere* is considered as a person *in esse* for the purpose of taking property, the limits of the rule may be in fact extended by the time of the gestation of such child; thus, if a devise be made to the child of A. for life, such child being *in ventre sa mere* at the testator's

death, the additional time of gestation may accrue at the commencement of the period allowed by the rule, which may be measured by the life of such child and twenty-one years; so, if a devise be made to the children of *A.* who shall attain the age of twenty-one years, and *A.* die, leaving a child *in ventre sa mere*, the additional time of gestation may accrue at an intermediate period, and the limits of the rule may be extended until such child attains the age of twenty-one years; so if the ultimate taker after a given period of lives in being and twenty-one years be a child *in ventre sa mere*, the limits of the rule may be in fact extended at the termination of the period by the time of gestation. The same rule applies to executory bequests of terms of years and chattel interests in land; and, it seems, also to the creation of future terms of years.

Id., 441, *note*. It may be here observed that the rule against perpetuities, though framed by analogy to the limits of perpetuity possible with common law limitations by way of estates for life and remainders, leads to some different results. The latter mode of limitation is restricted, as to perpetuity, by the lives of the persons actually taking estates, and by the actual minority of the ultimate remainderman; whereas the rule against perpetuities admits of an absolute period measured by lives and years, but wholly independent of the lives or minority of the persons actually interested; and in the case of the ultimate taker at the extreme limit of the period being a minor the disability to alienate might in fact be extended for a further period of twenty-one years. Again, the rule as to remainders prohibits absolutely the limitation of them to the issue of persons unborn; but the rule against perpetuities admits of executory limitations to the children or remoter issue of persons unborn, provided they are restricted to vest within the allowed period; and only when not so restricted such limitations are void. In the above respects, therefore, remainders are more restricted than other executory limitations; on the other hand remainders may be limited on events of indefinite contin-

gency, provided they become vested pending the particular estate. See 1 Jarman on Wills, 229; *Stuart v. Cockerell*, L. R. 7 Eq. 363.

WILLIAMS, REAL PROP. (17th ed.), 476. The common law rule against perpetuities, which is fully explained and illustrated in the text, is still in force in many of the States. The rule, says Professor Gray, has been carried as a part of the common law "to all the English colonies where the principles of the common law prevail. . . . Considering the unformed condition of the doctrine of remoteness at the time of the planting of the American colonies, it would have been quite possible for it to have developed there in a different shape from that which it assumed in England. But as a matter of fact the rule seems, in the absence of statute, to be always adopted throughout the United States in its modern English form." Gray, Perpetuities, § 200. . . . In several of the States we find modifications by statute to a greater or less extent of the common-law rule.¹ But the radical change was made in the State of New York with the adoption of the Revised Statutes. The system instituted in that State, except in its application to personal property, has since been followed in Michigan, Wisconsin and Minnesota.—*Hutchins' note*.

N. Y. REAL PROP. LAW, § 32. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any

¹ See Gray, *Perp.*, App. C.; 2 Wash. R. P., 795-799; Chaplin, *Alienation*, App.

other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.

§ 33. Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons the remainder shall take effect, in the same manner as if no other life estates had been created.

§ 34. A remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate in a term of years, unless it be for the whole residue of such term.

§ 35. When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced.

§ 36. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof.

§ 37. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

§ 39. All the provisions contained in this article, relative to future estate, apply to limitations of chattels, real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

II. Equitable Estates—Trusts.

LEAKE, LAND LAW, 243. Equitable estates and interests either correspond with legal estates or are of kinds peculiar to equity, having no analogy in law. . . .

Equitable estates which correspond with legal estates comprise estates in fee simple and fee tail, estates for terms of life and for terms of years, in strict analogy to the legal estates already described. They are created either by express limitation or by construction of equity—either by declared or by constructive trust. In the express limitation of equitable estates corresponding with legal estates, as regards the quantity of estate, equity, in general, follows the law; the same terms of limitation are used, and receive the same construction as in limiting estates at law.

Id., 469-473. In the limitation of equitable estates, corresponding with legal estates, future estates and interests are, in general, limited in the same manner, and the same language is used and receives the same construction, as in limiting future legal estates: according to the principle that equity follows the law. Accordingly, the equitable estate may be limited for a particular estate with remainder, or with successive remainders, or leaving a reversion, as at law. But the limitation of the trust or equitable estate is free from the restrictive rules peculiar to the quality of freehold tenure; for these rules are satisfied in their application to the legal estate of the trustee and have no ulterior effect on the beneficial interest. The rule of common law that the freehold cannot be in abeyance, with all its consequences in legal limitations, has no application in equity. Therefore, an equitable estate, freehold in quantity, may be limited to commence at a future time, or upon the happening of a fu-

ture event, without any preceding freehold estate to support it as a remainder. So an equitable estate may be limited to take effect in defeasance or substitution of a preceding estate without awaiting its determination, in the same manner as a shifting use or executory devise. The trust or equitable interest in leaseholds or terms of years may be limited with all the freedom of an executory bequest of personal estate. . . .

Future limitations of the trust or equitable estate are subject to the same rule against perpetuities as future legal limitations by way of springing use and executory devise, and the rule is applied according to the same principles. "It may be laid down without any qualification that no nearer approach to a perpetuity can be made through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests or will be admitted in a court of law."¹

By means of a trust or direction for that purpose the rents and profits of land may be withdrawn from present ownership and accumulated for the benefit of a future and uncertain owner. Such dispositions were impossible at the common law on account of the rule that the freehold could never be in suspense. Trusts and directions to accumulate rents and profits for future disposition are subject to the rule against perpetuities. . . .

The rules restrictive of contingent remainders at the common law have no application in equity. A contingent limitation of the equitable estate, though in the form of a contingent remainder at law, may take effect as and when it is limited to arise, subject only to the rule against perpetuities. It is not affected by the determination of the preceding estate before the happening of the contingency upon which it depends. Thus under a trust for *A.* for life and after his death for the children of *A.* who should attain twenty-one, the trust for the children will not fail by reason of *A.* dying before any child has attained that age, as would be the case

¹ Butler's Note to Co. Lit., 290, *b*, sec. 14.

with a contingent remainder at law in the same terms. So under a trust for *A.* for life and after his death to the children of *B.*, the trust for the children of *B.* does not fail upon the death of *A.* before children of *B.* exist.

If a contingent limitation be made without any preceding estate, or if a contingent limitation do not vest until after the determination of the preceding estate, the intermediate interest, unless otherwise disposed of, results to the settlor or his heir, or falls into the residue of his estate.

The rule in *Shelley's Case*, by which limitations in the form of remainders to the heirs or to the heirs of the body, after an estate of freehold in the ancestor, are referred to the estate of the ancestor, is applied by analogy in construing the like limitations of equitable estates, and upon the same principles upon which it is applied to legal limitations. But it can be applied only where the limitations to the ancestor and to the heirs are homogeneous, either both legal or both equitable; if the estate limited to the ancestor is equitable and the remainder to the heirs is legal, or conversely, the rule is not applicable. Where both the limitations are legal, a trust imposed upon one of them does not prevent the application of the rule to the legal limitations; for a court of law, in construing legal limitations, takes no notice of trusts.

Id., 244. But the rules of limitation apply only to express declarations of trust, and have no application to those equitable estates, which, though corresponding with legal estates, arise by construction of equity. Such are the constructive trusts or equitable estates and interests based upon the payment of the consideration of a purchase—or which arise from a mere contract to purchase—or resulting trusts which arise upon a legal conveyance not disposing of the whole equitable interest, or failing in effect to dispose of it. Trusts and equitable estates thus arising are, for the most part, measured and limited by the legal estates and interests on which they are imposed. Thus, the equitable estate attributed to the payment of a consideration is co-exten-

sive with the legal estate to which it is referred; so a resulting trust includes the whole undisposed of estate to which it applies; so by a contract of sale which equity would specifically enforce the purchaser may acquire an equitable estate in fee or other the whole interest which the vendor contracts to sell without any technical limitation.

Id., 473. Trusts for conversion, charges of money for portions, legacies, debts, etc., constituting equitable interests in land of a kind peculiar to equity, and having no correspondence with legal estates, may also be limited to take effect at a future time or upon the happening of some event or contingency, subject only to the rule against perpetuities.

WILLIAMS, REAL PROP. (17th ed.), 430. Contingent remainders may also be limited of trust estates. But between such contingent remainders, and contingent remainders of estates at law, there was also this difference, that whilst the latter were destructible, the former were not. The destruction of a contingent remainder of an estate at law depended, as we have seen, on the ancient feudal rule, which required a continuous and ascertained possession of every piece of land to be vested in some freeholder. But in the case of trust estates, the feudal possession remains with the trustee. And, as the destruction of contingent remainders at law defeated, when it happened, the intention of those who created them, equity did not so far follow the law as to introduce into its system a similar destruction of contingent remainders of trust estates. It rather compelled the trustees continually to observe the intention of those whose wishes they had undertaken to execute. . . .

BOOK IV.

RIGHTS LESS THAN OWNERSHIP.

Many of these rights have been more conveniently discussed in other connections. Easements, profits *a prendre* and other incorporeal hereditaments have been treated at length, pp. 22-37, *supra*; equitable interests generally, under the description of Trusts, pp. 165-178 and 397-400; contingent future interests, pp. 333-357; powers of appointment, pp. 383-390; rights of entry, pp. 300-315, 358-363 and 457-469; escheat and possibilities of reverter, pp. 363-369, and creditors' rights, pp. 525-531. As the law of mortgages is a composite of legal and equitable relations, it has seemed best to deal with it separately in this place.

CHAPTER I.

MORTGAGES.

LIT., § 332. *Of Estates upon Condition.*—Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c.; in this case the feoffee is called tenant in morgage, which is as much to say in French *mort gage*, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such summe or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

§ 333. Also, as a man may make a feoffment in fee in morgage, so a man may make a gift in taylor in morgage, and a lease for terme of life, or for terme of yeares in morgage. And all such tenants are called tenants in morgage, according to the estates which they have in the land.

2 BL. COM., 157-160. There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,

Estates held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives

the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e.g.*, 200*l.*) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land, which is so put in pledge, is by law,¹ in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt whether, by taking such estate in fee, it did not become liable to the wife's dower and other encumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on repayment of the mortgage-money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the

¹The student will observe that by "law" is here meant the law as administered in the common-law courts; in equity a different rule prevails. — *Chitty*.

estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II., c. 20, after payment or tender by the mortgagor of

principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*," for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*."¹ And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

DIGBY, HIST. REAL PROP., Ch. V., § 5 (2). *Mortgages*.—The second class of creditors' rights above noticed² exist when, without the intervention of any legal process, the debtor has voluntarily given his land as security for the debt.

This practice is very ancient. Pledges of land are often mentioned in Domesday. In the time of Glanvill pledges of land were of two kinds, *vivum vadium* and *mortuum vadium*. Where a *vivum vadium* was created, the land was conveyed to the creditor to be held by him for a certain time, during which the rents and profits went towards the discharge of the debt. In a *mortuum vadium* there was no such arrangement as to the profits. The latter class of security was looked on as a species of usury, and, though not absolutely prohibited, rendered the creditor liable to the penalties of usury. It appears however that upon payment of the debt the debtor might recover the land just as in the case of a pledge of a personal chattel. In the time of Littleton a mortgage had become a species of estate upon condition. The land was conveyed, usually by feoffment, by the debtor to the creditor, subject to the condition that on repayment of the loan by a certain day the feoffor (the debtor) might re-enter. On

¹ L. 10, c. 8.

² Digby, Ch. V., § 5.

the failure of the feoffor to perform the condition, the law refused to regard the fact that the real nature and intent of the transaction was that the land should be held by the feoffee merely as a security for a debt, and insisted on the enforcing of the rules relating to estates upon condition in all their strictness, holding that the estate was thereupon vested absolutely in the feoffee.

In later times, when the jurisdiction of the Chancellor was firmly established, the rights and duties of mortgagor and mortgagee recognized by Equity became wholly different from those recognized by Law. In form the transaction is still at the present day a conveyance of the lands, subject to a condition for re-entry, or more commonly to an agreement for reconveyance by the mortgagee to the mortgagor, on payment of the debt on a certain day, and to a proviso that, until default in payment of the debt, the mortgagor is to remain in possession. So far as the legal estate, or interest at common law, is concerned, the ordinary rules governing conveyances of land apply; no notice is taken of the object of the transaction; the mortgagor, who remains in possession, is considered to have an interest in the nature of a term until default made in the payment of the debt; after default, the whole legal property in the land passes irrevocably to the mortgagee, with all its incidents. For instance, a mortgagor, after default in payment of the mortgage debt, cannot, except under the special powers created by the Conveyancing and Law of Property Act 1881,¹ make a valid lease of the lands without the concurrence of the mortgagee. In Equity, however, the real nature of the transaction is regarded, and even after default is made, notwithstanding the terms of the instrument creating the mortgage, the mortgagee will be made to reconvey the land to the mortgagor on payment of debt, interest, and costs. The right which remains in the mortgagor is called his *equity of redemption* (right to redeem), and is in fact the ownership of the land subject to the mortgage debt.

¹ 44 & 45 Vict., c. 41.

CHAPTER II.

PUBLIC RIGHTS.

(a) *In Public Lands and Waters.*

HALE, DE JURE MARIS, Cap. IV. The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not. . . .

But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and the creekes and armes thereof; yet the common people of England have regularly a liberty of fishing in the sea or creekes or armes thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty. . . .

The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. . . . That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; so that the river of Thames above Kingston and the river of Severn above Tewkesbury, &c., though there they are publick rivers, yet are not arms of the sea.

5 B. & ALD., 268. By the common law, all the king's subjects have in general a right of passage over the sea with their ships, boats and other vessels, for the purposes of navigation, commerce, trade and intercourse, and also in navigable rivers; and they have also, *prima facie*, a common

of fishery there. . . . These rights are noticed by Lord Hale; but whatever further rights, if any, they may have in the sea or in navigable rivers, it is a very different question whether they have or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between the high and low water-mark) when it is not sea, or covered with water. . . .—*Per* Holroyd, J., in *Blundell v. Catterall* (1821).

98 N. Y. REP., 642. The seashore is not a highway for public travel upon foot or with vehicles. It is a part of the ocean, and that is a public highway for vessels. Every one can, however, unless the public authorities by lawful action interfere, go upon the seashore between high and low water-mark to fish, to bathe, or for any other lawful purpose. But obviously he must use the shore as he finds it, and he can look to no one for any damages he sustains there from any defects therein.—*Per* Earl, J., in *Murphy v. City of Brooklyn* (1885).

(b) *In Private Lands and Waters.*

(1) RIVERS.

HALE, DE JURE MARIS, Cap. I. Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquae*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side. And if a man be owner of the land of both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience. . . .

Though fresh rivers are in point of propriety as before *prima facie* of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them; viz., one of prerogative,

belonging to the king, and another of public interest, or belonging to the people in general.

Id., Cap. III. There be some streams or rivers that are private, not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both, from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments and removed; and this was the reason of the statute of *Magna Charta*, cap. 23.

2 B. & P., 472. [In trespass for entering upon plaintiff's sea-shore and digging and taking shell-fish and shells therefrom] The COURT were of opinion that if the plaintiff had it in his power to abridge the common law right of the subject to take sea-fish, he should have replied that matter specially, and that, not having done so, the defendant must succeed upon his plea so far as related to the taking of the fish; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind.—*Bagott v. Orr* (1801).

(2) HIGHWAYS.

LEAKE, USES OF LAND, 482. The rights *in alieno solo* above treated¹ belong to a person in a private or corporate

¹ The reference is to Easements, Profits *a prendre* and Rents; Leake, Uses of Land, 185-481.

capacity, and are rights of property in the strict meaning of the term. The rights *in alieno solo* here treated belong to a person only as one of the public; and they differ from rights of property in having no determinate owner, personal or corporate. They are common to the public at large, or to a part of the public limited by a certain locality or description, and they are distinguished accordingly as being general or local. Of the former kind are all public rights of way, highways, bridges and the like, which are for the use and accommodation of all subjects of the realm. Of the latter kind are privileges of persons within some limited district of using land for purposes of local convenience, such as a right of way to church or market, or a right of enjoying an open space for exercise or recreation. The former kind of public rights are founded upon the general custom of the realm or common law; the latter upon the special custom of the district, or *lex loci*. The public, as such, can acquire no right to take profits *in alieno solo*.

A public way or highway is a right of passage for the public in general. It resembles an easement in regard to the servient tenement, but differs from an easement in there being no dominant tenement, without which there can be no easement properly so called. But "in truth, a public road or highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement."¹

487. In the absence of evidence to the contrary, the presumption is that the soil of the highway belongs to the owner of the inclosed lands between which it passes; and if the land on each side of the road is held by different owners, the presumption is that each side of the highway to the

¹ Cairns, L. J., *Rangeley v. Midland Ry.*, L. R. 3 Ch. 3 11.

medium filum viae belongs to the owner of the adjoining land.

490. "The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith."¹ Thus, trees growing upon the highway, though they may be removeable as obstructions to the traffic, presumptively belong to the owner of the soil. . . .

The owner of the soil may bring an action of trespass for an invasion of his possession; and he may maintain an action of ejectment to recover possession of an encroachment wrongfully made. The court will also grant an injunction to restrain a continuing trespass to the soil of a highway; as where a person opened the surface and laid waterpipes in the soil without the consent of the owner. . . . A person using a highway for any purpose other than passing and repassing according to the lawful use, is a trespasser against the owner of the soil; as if he puts his cattle upon the highway to feed. . . .

495. The public are entitled to use a highway for passing and repassing, on foot, or with horses, carts and cattle, according to the species of highway; any other use of the highway that obstructs the public use of any part of the highway for passing and repassing is a nuisance, which may be met by indictment on behalf of the public, or by action at the suit of a person suffering damage, or in some cases by summary proceedings for penalties.

¹ *Per cur.*, *St. Mary Newington v. Jacobs*, L. R. 7 Q. B. 47.

BOOK V.

THE CREATION AND TRANSFER OF INTERESTS IN LAND.

A. AT COMMON LAW.

I. Title by Act of the Parties.

CHAPTER I.

PURCHASE AND DESCENT.

LIT., § 12. Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his owne deed.

Co. LIT., 18, *b*. A purchase is alwayes intended by title, and most properly by some kinde of conveyance either for money or some other consideration, or freely of gift; for that is in law also a purchase. But a descent, because it commeth meerely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1 H. 5, ca. 5, speake of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his

own deed or agreement, as our author here saith. Like law of the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c., cannot be said to come in by purchase, no more than robbery, burglary, piracy, or the like, can justly be termed purchase.

Id., 18, b. An escheat in appearance participates of the nature both of a *purchase* and a *descent*; of the former because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the latter, because it follows the nature of the seignior, and is inheritable by the same persons. But strictly speaking, an escheat is a title neither by purchase nor descent. . . . It would be more accurate to say, that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law*, and under the latter to consider first descent and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law.—*Hargrave's note*.

2 BL. COM., 201. The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement.

Id., 241. Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton;¹ the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

¹ § 12.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir-at-law by will, *with* other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase. But if a man, seised in fee, devises his whole estate to his heir-at-law, so that the heir takes neither a greater nor a less state by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances, this being for the benefit of creditors and others who have demands on the estate of the ancestor.

Id., 243. The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust

for him) had any estate of inheritance vested in him by descent from (or any estate *per auter vie* coming to him by special occupancy, as heir to) that ancestor, sufficient to answer the charge; whether he remains in possession, or hath alienated it before action brought; which sufficient estate is in the law called *assets*: from the French word, *assez*, enough. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent. This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. . . .

CHAPTER II.

FEOFFMENT.

LIT., § 59. And it is to be understood that in a lease for yeares, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in taile, or lease for terme of life; in such cases where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin.

Co. LIT., 48, a. *Traditio, or deliberatio seisinæ*, is a solemnitie that the law requireth for the passing of a freehold of lands or tenements by deliverie of seisin thereof. . . .

And there be two kinds of livery of seisin, *viz.*, a liverie in deed, and a liverie in law. . . . A liverie in deed may be done two manner of wayes. By a solempne act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe, and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed; or by words without any ceremony or act; as, the feoffor being at the house doore, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus*: or, Enter you into this house or land, and have and enjoy it according to the deed: or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a liverie

within the view, much more it shall upon the land. But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed; but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth that the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it beene resolved by all the judges; and so of the like.

48, *b*. A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly), and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur*. . . . But if either feoffor or the feoffee die before entry the livery is voyd. And livery within the view is good where there is no deed of feoffment. And such a liverie is good, albeit the land lie in another county. . . . A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee, &c., as shall be said hereafter more at large in the chapter of Continuall Claime. And so note a liverie in law shall be perfected and executed by an entry in law.

LIT., § 60. But if a man letteth lands or tenements by deed or without deed for terme of yeares, the remainder over to another for life, or in taile, or in fee; in this case it behooveth that the lessor maketh livery of seisin to the

lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termour in this case entreth before any liverie of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the forme of the grant and the will of the lessor.

2 BL. COM., 310. 1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of, the ancient feudal donation; for though it may be performed by the word "enfeoff" or "grant," yet the aptest word of feoffment is, "do" or "dedi." And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*." And, therefore, as in pure feudal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse praesumatur quam in donatione expresserit*," so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and

subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance whereby our ancestors were wont to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs forever; though it serves equally well to convey any other estate or freehold.

But by the mere words of the deed the feoffment is by no means perfected: there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporeal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio*."¹

Id., 316. A feoffment has of late been generally resorted to in practice rather for its peculiar powers and effects than as a simple mode of assurance from one person to another. Thus, a feoffment by a particular tenant, until recently, destroyed the contingent remainders depending on the particular estate, and, if made by a tenant in tail in possession, discontinued the estate-tail; and at one time it seemed quite settled that a feoffment might be employed to convey a fee to the feoffee by disseisin, whatever might have been the estate of the feoffor, provided he had possession of the lands enfeoffed. But this doctrine has for some time been greatly shaken; and it has been considered that a feoffment had no longer this effect. . . . By Stat. 8 and 9 Vict., c. 106, § 4, a feoffment made after the 1st of October, 1845, shall not have any tortious operation, and is now to be ranked among what are called *innocent conveyances*.—*Stewart's note*.

¹ L. 3, c. 14, § 5.

DIGBY, HIST. REAL PROP., Ch. III., § 12 (2). In order to acquire *possessio* two elements are necessary: 1. The consciousness of actual or possible physical control of the thing which is the subject of acquisition. 2. The *animus sibi habendi*. The requisites for the acquisition of *possessio* were to this extent common with the requisites for acquiring property by *traditio*, or delivery; and the application of these rules gave rise to the feudal notion of investiture—the clothing the donee with the actual possession of the land the subject of the grant.

Since, as has been seen, freehold interests were formerly the only interests in land known to the law, a grant of land is synonymous with a grant of a freehold interest in land, and the doctrines of Roman law as to conveying things movable by *traditio*, and things immovable by allowing the donee to enter on the vacant possession, gave rise to the principle that for passing a freehold interest in lands a ceremony was necessary by which the possession of the land itself should be given to the donee. This was livery, or delivery, of the seisin or possession of the land, and was effected either by the donor himself or his deputy. What did and what did not amount to “livery of seisin” now becomes a curious question. Speaking generally, it must be the delivery of something, such as a clod of earth or a twig, on the land in the name of the whole, or it was sufficient if the two parties were actually present on the land and the one by word or act gave possession to the other. It was even effectual for the donor to bring the donee within sight of the land and to give him authority to enter, provided this were followed by the entry of the donee during the lifetime of the donor. Great importance was attached to the notoriety of the transaction. That all the neighbors might know that *A.* was tenant to *B.* from the fact that open livery of seisin had been made to him, was of the utmost importance to *B.* in order to protect and to enable him to assert his rights as lord. For in case of dispute as to the title to the lands, or the right to services, aids or reliefs, the fact of this open

and notorious livery of seisin enabled the lord to appeal to the tribunal before which, since the reforms of Henry II., suits relating to land were commonly decided—the verdict of twelve *legales homines de vicineto*, who would know themselves or have heard from their fathers the truth of the matter.

4 KENT COM., 480. Nothing can be more concise, and more perfect in its parts, than the ancient charter of feoffment. It resembles the short and plain forms now commonly used in the New England States. . . .

The feoffment operated upon the possession without any regard to the estate or interest of the feoffor; and though he had no more than a naked, or even tortious possession, yet, if the feoffor had possession, the feoffment had the transcendant efficacy of passing a fee by reason of the livery, and of working an actual disseisin of the freehold. It cleared away all defeasible titles, divested estates, destroyed contingent remainders, extinguished powers, and barred the feoffor from all future right, and possibility of right, to the land, and vested an estate of freehold in the feoffee. In this respect the feoffment differed essentially from a fine, or common recovery; for the conusor in the fine, and the tenant to the *præcipe*, must be seised of the freehold, or of an estate in fee, or for life, otherwise the fine or recovery may be avoided.

STAT: 8 & 9 VICT., c. 106, § 4. A feoffment made after the . . . first day of October, 1845, shall not have any tortious operation.

N. Y. REAL PROP. LAW, § 206. The conveyance of real property, by feoffment, with livery of seisin, has been abolished.

§ 210. . . . A greater estate or interest does not pass by any grant or conveyance than the grantor possessed or could lawfully convey at the time of the delivery of the deed. . . .

CHAPTER III.

FINE AND RECOVERY.

2 BL. COM., 348-357. A fine is sometimes said to be a feoffment of record; though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A fine is so called because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. . . . Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil¹ and Bracton² in the reigns of Hen. II. and Hen. III. as things then well known and long established; and instances have been produced of them even prior to the Norman invasion.³ So that the statute 18 Edw.

¹ L. 8, c. 1.

² L. 5, t. 5, c. 28.

³ Plowd. 369.

I., called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows :

1. The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, by suing out a writ of *prae-cipe*, called a writ of covenant : the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other ; on the breach of which agreement the action is brought. . . . The suit being thus commenced, then follows,

2. The *licentia concordandi*, or leave to agree the suit. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted. . . .

3. Next comes the *concord*, or agreement itself, after leave obtained from the court : which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before the lord chief-justice of that court ; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*, which judges and commissioners are bound, by statute 18 Edw. I. st. 4, to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the fine shall be carried on in all its remaining parts: of which the next is,

4. The *note* of the fine; which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee, usually beginning thus "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

* * * * *

We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The antient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I., in these words: "And the reason why such solemnity is required in the passing of a fine is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas the day of the fine levied; unless they put in their claim on the foot of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16, which admitted persons to claim, and falsify a fine, at any indefinite distance; whereby, as Sir Ed-

ward Coke observes, great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII. reformed that mischief, and excellently moderated between the latitude given by the statute and the rigor of the common law. For the statute then made restored the doctrine of non-claim, but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years, after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

* * * * * *

But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risk defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo*: whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. It is not, therefore, to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire, the estate is forever barred by it. Yet where a *stranger*, whose presumption cannot be thus punished, officiously interferes in an estate which in nowise belongs to him, his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is

liable to be defeated by the same plea. Wherefore when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

Id., 357-362. The fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterward encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now, therefore, only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit of action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted with the course of judicial proceedings; which cannot be thoroughly explained till treated of at large in the third book of these commentaries. However, I shall endeavor to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards to be

tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery-roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private: which is (as usual) allowed him. And soon afterward the demandant Golding returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question, against the tenant, Edwards, who is now the recoveree; and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter. This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has

only a nominal recompense for the land so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding, the purchasor. . . .

This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. . . .

To such awkward shifts, such subtle refinements, and such strange reasoning were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design for which these contrivances were set on foot were certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot admire the means. . . .

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. . . . In all recoveries it is necessary that the recoveree, or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the recovery is void. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. . . .

4 KENT. COM., 497. *Of Fines and Recoveries*.—Alienation by matter of record, as by *fin*es and *common recoveries*, makes a distinguished figure in the English code of the common assurances of the kingdom. But they have not been in much use in any part of this country, and probably were never adopted, or known in practice in most of the States. The conveyance by common recovery was in use in Pennsylvania, Delaware and Maryland, before the American revolution; but it must have become obsolete with the disuse of estates tail. Fines have been occasionally levied in New York for the sake of barring claims; but by the *New York Revised Statutes*¹ fines and common recoveries are now abolished. . . . The conveyance by fine, as a matter of record, transacted in one of the highest courts of common law, has some great advantages, and merits a more serious consideration. Its force and effect are very great; and great solemnity is required in passing it, because, said the statute of 18 Edw. I., “the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those who are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied, unless they put in their claim within a year and a day.” This bar by non-claim was, afterwards, by the statute of 4 Hen. VII., extended to five years. These statutes; and this bar of non-claim after five years, were re-enacted in New York, and continued in force until January, 1830; and common recoveries were equally recognized by statute as a valid mode of conveyance down to this last-mentioned period. Such a formal, solemn, and public mode of conveyance, with such a short bar by non-claim, was resorted to in special cases, where title had become complex, and the property was of great value, and costly improvements were in immediate contemplation.

¹ Vol. II., 343, sec. 24.

CHAPTER IV.

GRANT AND ATTORNMENT.

Co. Lit., 172, a. "*Grant*," *concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. . . .

171, b. "*Fait*," *Factum*, *Anglice* a deed, and signifieth in the common law, an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *literarum obligatio*.

49, a. . . . So to conclude this point; of freehold and inheritances some be corporeall, as houses, &c., lands, &c.; these are to passe by liverie of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c.; these cannot passe without deed, but without any liverie. And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth passe, which is in lieu of the livery. See *Bract.*, lib. 2, cap. 18. . . .

Lit., § 551. *Attornment* is, as if there bee lord and tenant, and the lord will grant by his deed the services of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant must attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c., or I am well content with the grant made to

you; but the most common attornment is to say: Sir, I attorne to you by force of the said grant, or I become your tenant, &c., or to deliver to the grantee a pennie, or halfe-pennie, or a farthing, by way of attornment.

§ 567. Also, if a man letteth tenements for terme of yeares, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for terme of life, or in taile, or in fee, it behoveth in such case that the tenant for yeares attorne, or otherwise nothing shall passe to such grantee by such deed. And if in this case the tenaunt for yeares attorne to the grantee, then the freehold shall presently passe to the grantee by such attornment without any liverie of seisin, &c., because if any liverie of seisin, &c., should be or were needfull to bee made, then the tenant for yeares should be at the time of the livery of seisin ousted of his possession, which should bee against reason, &c.

§ 568. Also, if tenements be letten to a man for terme of life, or given in taile, saving the reversion, &c., if hee in the reversion in such case grant the reversion to another by his deed, it behooveth that the tenant of the land attorne to the grantee in the life of the grantor, or otherwise the grant is voyd.

§ 569. In the same manner is it, if land be granted in taile, or let to a man for terme of life, the remainder to another in fee, if he in the remainder will graunt this remainder to another, &c., if the tenant of the land attorne in the life of the grantor, then the grant of such a remainder is good, or otherwise not.

§ 570. P. 12. *Edw.* 4. It is there holden by the whole court, that tenant in taile shall not be compelled to attorne, but if he will attorne *gratis*, it is good enough.

Co. Lit., 316, *b.* This is added to *Littleton*, and therefore, though it be good law, and the booke truly cited, yet I passe it over.

Id., 309, *a.* "*Attornment*" is an agreement of the ten-

ant to the grant of the seigniorie, or of a rent, or of the donee in taylor, or tenant for life or yeeres, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a torning or attorning from one to another. Wee use also *attornamentum* as a Latine word, and *attornare* to attorne. And so *Bracton* useth it. . . .

And the reason why an attornment is requisite, is yeeled in old bookes to be, *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quod possit eum subjugare capitali inimico suo, et per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderet.*

309, a, b. "*Il covient que le tenant attorna al grantee en la vie del grantor, &c.*" And so must he also in the life of the grantee; and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case, if the grantor dieth before attornment, the seigniorie, rent, reversion or remainder descend to his heire; and therefore after his decease the attornment commeth too late: so likewise if the grantee dieth before attornment, an attornment to the heire is void, for nothing descended to him; and if he should take, he should take it as a purchasor, where the heires were added but as words of limitation of the estate, and not to take as purchasors. . . .

A grant to the king, or by the king to another, is good without attornment, by his prerogative.

Id., 271, b. . . . A *grant*, in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by writing, in order to produce that notoriety in the transfer of them which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except

that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ. Such was the original distinction between a feoffment and a grant. But, from this real difference in their *subject matter*, a difference was supposed to exist in their *operation*. A feoffment visibly operated on the *possession*; a grant could only operate on the *right* of the party conveying. Now, as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which was considered as transferring the possession must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense we are to understand the expressions which frequently occur in our law-books, where they describe a feoffment to be a *tortious*, and a grant to be a *rightful* conveyance. Thus, from a difference in the *quality* of the hereditaments conveyed by those two modes of conveyance, a difference has been considered to exist in their *operation*. . . . *Butler's note*, 231, 1. (1).

Co. Lit., 309, a. Sir Martin Wright and many other writers have laid it down as a general rule that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seigniorship without the consent of his feudatory; for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his seig-

niory without the consent of his vassal. See Sir Martin Wright's Introduction to the Law of Tenures, 30, 31. . . . This necessity, which subsisted in our old law, that the tenant should consent to the alienation of the lord, gave rise to the doctrine of attornment. At the common law attornment signified only the consent of the tenant to the grant of the seignior; or, in other words, his consent to become the tenant of the new lord. But after the statute *quia emptores terrarum* was passed, by which subinfeudation was prohibited, it became necessary, that when the reversioner or remainder-man, after an estate for years, for life or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee; as the particular tenant must, otherwise, have held of the remainder-man, and he of the chief lord; by which a new tenure would be created. The necessity of attornment was, in some measure, avoided by the statute of uses, as by that statute the possession was immediately executed to the use; and by the statute of wills, by which the legal estate is immediately vested in the devisee. Yet attornment continued after this to be necessary in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Anne, c. 16, and 11 Geo. 2, c. 19. . . . —*Butler's note*, 272.

STAT. 4 ANNE (1705), c. 16, § 9. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

§ 10. Provided, nevertheless, that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee.

4 KENT COM., 490. There was this essential difference between a feoffment and a grant; while the former carried destruction in its course, by operating upon the possession, without any regard to the estate or interest of the feoffor, the latterly benignly operated only upon the estate or interest which the grantor had in the thing granted, and could lawfully convey. Feoffment and grant were the two great disposing powers of transfer of land, in the primitive ages of the English law. . . .

The necessity of the attornment was partly avoided by the modern modes of conveyance under the statute of uses; and it was at last completely removed by the statutes of 4 and 5 Anne, c. 16, and 11 George II. c. 19; and it has been equally abolished in these United States. The *New York Revised Statutes* have rendered the attornment of the tenant unnecessary to the validity of a conveyance by his landlord; though, to render him responsible to the grantee, for rent or otherwise, he must have notice of the grant. Nor will the attornment of a tenant to a stranger be valid, unless made with his landlord's consent, or in consequence of a judgment or decree or to a mortgagee after forfeiture of the mortgage.

The *New York Revised Statutes* have given to deeds of conveyance of the inheritance or freehold, the denomination of *grants*; and, though deeds of bargain and sale, and of lease and release may continue to be used, they are to be deemed grants. That instrument of conveyance is made competent to convey all the estate and interest of the grantor, which he could lawfully convey; and it passes no greater or other interest.¹

¹ New York Revised Statutes, Vol. I. 738, secs. 137, 138, 142, 143.

N. Y. REAL PROP. LAW, § 213. An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor by his tenant before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease.

CHAPTER V.

RELEASE.

LIT., § 444. *Releases* are in divers manners, *viz.*, releases of all the right which a man hath in lands or tenements, and releases of actions personalls and realls, and other things. Releases of all the right which men have in lands and tenements, &c., are commonly made in this forme, or of this effect:

§ 445. *Know all men by these presents, that I, A. of B., have remised, released, and altogether from me and my heires quiet claimed: or thus, For mee and my heires quiet claimed to C. of D. all the right, title, and claim which I have, or by any meanes may have, of and in one messuage with the appurtenances in F., &c. And it is to bee understood, that these words, remisisse, et quietum clamasse, are of the same effect as these words, relaxasse.*

§ 446. Also, these words which are commonly put in such releases, *scilicet* (*quae quovismodo in futurum habere potero*) are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and sonne, and the father bee disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c., and after the father dieth, &c., the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c.

§ 447. Also, in releases of all the right which a man hath

in certaine lands, &c., it behooveth him to whom the release is made in any case, that hee hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made hath the freehold in deed, or in law, at the time of the release, &c., there the release is good.

§ 449. Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which hee hath by disseisin to another for terme of his life, saving the reversion to him, if the disseisee or his heire release to the disseisor all the right, &c., this release is good, because hee to whom the release is made had in law a reversion at the time of the release made.

§ 450. In the same manner it is, where a lease is made to a man for terme of life, the remainder to another for terme of another man's life, the remainder to the third in taile, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because everie of them hath a remainder in deed vested in him.

§ 451. But if the tenant for terme of life be disseised, and afterward he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because hee had not a remainder in deed at the time of the release made, but only a right of a remainder.

§ 459. Also, if a man letteth to another his land for terme of yeares, if the lessor release to the lessee all his right, &c., before that the lessee had entred into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heire, is sufficient to him by reason

of the privitie which by force of the lease is between them, &c.

§ 460. In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession; if the lessor in this case make a release to the lessee of all his right, &c., this release is good enough for the privity which is betweene them; for it shall bee in vaine to make an estate by a livery of seisin to another where he hath possession of the same land by the lease of the same man before, &c.

But the contrarie is holden, *Pasch.* 2, E. 4, by all the justices.

Co. Lit., 270, b. "*Sed contrarium tenetur, &c.*" This is of a new addition, and the booke here cited ill understood, for it is to be understood of a tenant at sufferance.

Lit., § 461. But where a man of his owne head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c., if hee which hath the freehold will release all his right to the occupier, &c., this release is void, because there is no privitie betweene them by the lease made to the occupier, nor by other manner, &c.

Co. Lit., 271, a. *Privitie* is a word common as well to the English as to the French, and in the understanding of the common law is fourefold: 1. As privies in estate, whereof *Littleton* here speaketh, as between the donor and donee, lessor and lessee, which privitie is ever immediate. 2. Privies in blood; as the heire to the ancestor, or betweene coparceners, &c. 3. Privies in representation; as executors, &c., to the testator. And fourthly, privities in tenure, as the lord and tenant, &c., which may be reduced to two generall heads, privies in deed, and privies in law.

2 BL. COM., 324. These [feoffment, gift, grant, lease, exchange, partition] are the several species of *primary* or

original conveyances. Those which remain are of the *secondary* or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance: as,

Releases; which are a discharge or a conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and forever quit-claimed." And these releases may enure either: 1. By way of *enlarging an estate*, or *enlarger l'estate*: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the releesee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releesee. 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. And in both these cases there must be a privity of estate between the releasor and releesee; that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. 4. By way of *extinguishment*: as if my tenant for life makes a lease to *A.* for life, remainder to *B.* and his heirs, and I release to *A.*; this extinguishes my right to the reversion, and shall enure to the advantage of *B.*'s remainder as well as of *A.*'s particular estate. 5. By way of *entry and feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect

as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeofed one of the disseisors in fee. And hereupon we may observe that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the relesee is a matter of sufficient notoriety already.

2 WASHBURN, REAL PROP., 606. . . . It may be remarked that while a deed of simple release, made to one who has neither an estate in nor possession of land, would be merely void, a form of deed of the nature of a release, containing words of grant as well as release, commonly known as a "quit-claim" deed, has long been in use in this country, and has not only been regarded practically as a mode of conveying an independent title to real property, but is, by the statutes of some of the States, declared to be effectual for that purpose. But a quit-claim deed does not pass any more title than the grantor has. . . . Yet if the grantor have a title to land, a deed of quit-claim is just as effective to pass that title as a deed with covenants of warranty.

CHAPTER VI.

SURRENDER.

Co. Lit., 337, *b*. "*Surrender*," *sursum redditio*, properly is a yeelding up of an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them.

338, *a*. A surrender properly taken is of two sorts, *viz.*, a surrender in deed, or by expresse words (whereof *Littleton* here putteth an example),¹ and a surrender in law wrought by consequent by operation of law. *Littleton* here putteth his case of a surrender of an estate in possession, for a right cannot bee surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for yeares to begin at *Michaelmasse* next, this future interest cannot be surrendered, because there is no reversion wherein it may drowne; but by a surrender in law it may be drowned. As if the lessee before *Michaelmasse* take a new lease for yeares either to begin presently or at *Michaelmasse*, this is a surrender in law of the former lease. *Fortior & aequior est dispositio legis quam hominis*.

Also there is a surrender without deed, whereof *Littleton* putteth here an example, of an estate for life of lands, which may be surrendred without deed, and without livery of seisin; because it is but a yeelding, or a restoring of the state againe to him in the immediate reversion or remainder, which are alwayes favoured in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed,

¹ § 636.

and by consequent the estate cannot be surrendered without deed. But in the example that *Littleton* here putteth, the estate might commence without deed, and therefore might bee surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and qualitie of the thing demised, because the particular estate might have bene made without deed; and so on the other side. If a man be tenant by the courtesie, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and qualitie of the thing that lies in grant, it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentiful matter of surrenders.

2 BL. COM., 326. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin; for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate: and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same

reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory.

15 WEND. (N. Y.), 405-407. Before the statute of frauds and perjuries, any form of words without writing, whereby an intention appeared to surrender up the possession of the premises to the lessor or reversioner, was sufficient for that purpose. This was called a surrender in *fact*. There was also a surrender in *law*. It was effected by the acceptance of a new lease of the premises from the lessor, for the whole or a part of the time embraced in the former one, because it necessarily implied a determination and surrender of that lease; otherwise the lessor would be unable to make the second, or the lessee to enjoy it, and it was therefore but reasonable to presume both parties intended to waive and relinquish the benefit of the first one. The second lease before the statute referred to of course need not have been in writing to operate an effectual surrender of the first one. The statute of 29 Car. enacted "that all leases, estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any lands, &c., *made or created* by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only," &c., excepting leases not exceeding the term of three years from the making thereof. And also, "no leases, estates or interest, either of freehold or term of years, or any uncertain interest, &c., of, in, to or out of any messuages, &c., shall be assigned, *granted or surrendered*, unless by deed or note, in writing, or *operation of law*." Our statute (2 R. S., 134, § 6) provides that "no estate or interest in lands, other than leases for a term not exceeding one year, &c., shall hereafter be created, granted, assigned, *surrendered*,

&c., unless *by act or operation of law*, or by deed or conveyance in writing," &c., § 8.

* * * * *

It is stated by Baron Gilbert, 4 *Bacon's Abr.*, 210, that since the statute of frauds the new lease must be in writing in order to operate as an implied surrender of the old one, for it is then of equal notoriety with a surrender in writing. This position is also adopted by Serjeant Williams, in his notes upon the case of *Thursby v. Plant*, 1 *Saund.* 236, *n. b.* But as surrenders by operation of law are expressly excepted out of the statute, as a necessary consequence they are left as at common law; and there it is clear it need not be in writing to have the effect to surrender the old one, even if by deed. 2 *Starkie's Ev.* 342; 20 *Viner*, 143, *L. pl.* 1, *n.*; 1 *Saunders*, 236, *n. c.* I am inclined therefore to think that a valid parol lease, since the statute, might produce a surrender in law within the reason and principle upon which this doctrine is founded. The true rule seems to be that laid down by Mr. Starkie, 2 *Starkie's Ev.* 342, as follows: The taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, provided it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it is no implied surrender of the old one.—*Per Nelson, J.*, in *Schieffelin v. Carpenter* (1836).

CHAPTER VII.

DEDICATION.

3 KENT COM., 450. Dedications of land for public purposes, as for charitable and religious uses, and for public highways and village squares, enure as grants, and may be valid, without any specific grantee *in esse* at the time, to whom the fee could be conveyed. And if a street be designated by public commissioners, duly authorized, as passing over certain lands, and the owner subsequently conveys part of the land as lots, *bounding them on such a street*, this is held to be a dedication of the land, over which the street passes, to the public use, and on opening the street the purchaser can only obtain a nominal sum as a compensation for the fee. But it has been an unsettled question what length of time was requisite to create the presumption of a valid dedication of a highway to the public. . . . The true principle on the subject, to be deduced from the authorities, I apprehend to be, that if there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required as being the usual and analogous period of limitation. But if there were clear, unequivocal and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment of the road, those acts would be sufficient to establish the dedication within any intermediate period.

II. Title by Operation of Law.

CHAPTER I.

DESCENT.

GLANVILL, VII., c. 3. Of heirs some are next of blood, some are more remote. Heirs next of blood are those who are begotten of the body of the ancestor, as a son or a daughter. On failure of these the remoter heirs are called to the inheritance, for instance the grandson or granddaughter descending in a direct line from a son or a daughter without limit. Next the brother and sister and their descendants. Next the uncle both on the father's and the mother's side, and the aunt in like manner and their descendants. When, therefore, any one who holds an inheritance dies, if he has an only son, it is without reserve true that that son is the successor of his father in the whole inheritance. If he has left more sons than one, then there is a distinction whether he was a knight, or a tenant of a knight's fee, or a free socman. Because if he were a knight or a tenant by knight service, then according to the law of England the first-born son succeeds his father in the whole inheritance, so that none of his brothers can demand of right any share therein. If, however, he be a free socage tenant, then the inheritance shall be divided between all the sons, however many they be, in equal shares, if that socage-land has been subject by ancient custom to division, saving, however, to the eldest son the chief messuage in consideration of the dignity due to his seniority. He must, however, make its value good to the others out of other property. But if there is no ancient custom of division, then the first-

born son according to the custom of some places will get the whole inheritance, while according to the custom of other places the youngest son is the heir. Further, if any one leaves an only daughter his heiress, then what has been said above as to an only son applies to the daughter without any distinction. But if he has left more daughters than one, then the inheritance shall be divided equally among them, whether their father was a knight or a socman, saving, however, to the eldest daughter the chief message according to the above-mentioned rule. And it should be observed that if any one of the brothers or sisters, amongst whom the inheritance is divided, dies without an heir of the body, then the share which belonged to the deceased shall be divided amongst the other survivors. . . . If, moreover, any one has a son and heir, and besides a daughter or daughters, the son succeeds to the whole; hence it follows that if any one has had more wives than one, and a daughter or daughters by each of them, and at last by the latest wife an only son, that son alone takes the inheritance of his father, because, speaking generally, it is true that a woman never shares with a man in any inheritance, unless there may be some special practice in a particular borough existing by virtue of long usage in that borough. If, however, any one has had several wives, and by each of them a daughter or daughters, all the daughters shall share equally in the father's inheritance, in the same way as if they had all been by the same mother. And when any one dies without a son or daughter as heir, if he has grandsons or granddaughters, children of a son or a daughter, then there is no question but that the grandchildren succeed in the same way as has been before laid down concerning the succession of a son or daughter, and that the same rules apply. For lineal descendants are always preferred to collaterals. But when any one dies leaving a younger son and a grandson the son of a pre-deceased eldest son, there often arises a great question as to the law, which of the two should be preferred to the succession, that is to say, whether the younger son or the

grandson. For some used to be of opinion that the younger son was the rightful heir rather than the grandson, apparently on the ground that the first-born son, not having survived his father, never actually became his heir, and so the younger son having survived both his father and his brother rightly in their view succeeds his father. Others, however, think that the grandson ought of right to be preferred to his uncle. For since the grandson is the issue of the eldest son, and is the heir of his body, he ought to succeed to all the rights which his father would have had if he had been still alive. This is my opinion, unless the father has been portioned by the grandfather, etc.

c. 4. On the failure of lineal descendants the brother or brothers will succeed, or, if there are no brothers, then the sisters come in; if these are pre-deceased, their children are next in order, and after these the uncles and their children, and in the last place aunts and their children, bearing in mind the distinction above explained between the sons of a knight and the sons of a socman, and the grandsons in like manner, observing also the distinction between males and females.

c. 16. A doubt may arise as to the case of a bastard, who cannot have any heir unless he have an heir of his body.

HALE, COM. LAW, 250-255. First, touching hereditary successions. It seems, that according to the ancient British laws, the eldest son inherited their *earldoms and baronies*; for they had great dignities and jurisdictions annexed to them, and were in nature of principalities; but that their *ordinary freeholds* descended to all their sons; and this custom they carried with them into Wales, whither they were driven. . . .

Whereupon, three things are observable, viz.: First, that at this time, the hereditary succession of the eldest son, was then known to be of the common and usual law in England. Secondly, that the succession of all the sons was the ancient *customary law* among the British in Wales, which by this

statute was continued to them. Thirdly, that before this time bastards were admitted to inherit in Wales, as well as the legitimate children; which custom is hereby abrogated: and although we have but few evidences touching the British laws before their expulsion hence into Wales, yet this usage in Wales seems sufficiently to evidence this to have been the ancient British law.

Secondly, as to the times of the Saxons and Danes. Their laws, collected by Brompton and Lambard, speak not much concerning the course of descents; yet it seems that commonly descents of their ordinary lands at least, except baronies and royal inheritances, descended also to all the sons; for amongst the laws of King Canutus, in Mr. Lambard, is this law, viz., No. 68: "*Sive quis incuria sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereotici nomine) sibi assumito. Verum eas judicio suo uxori, liberis & cognatione proximis juste (pro suo cuique jure) distributo.*" . . .

But this equal division of inheritances among all the children was found to be very inconvenient, for:

First, it weakened the strength of the kingdom; for by frequent parcelling and subdividing of inheritances, in process of time they became so divided and crumbled, that there were few persons of able estates left to undergo public charges and offices.

Secondly, it did by degrees bring the inhabitants to a low kind of country living; and females were broken; and the younger sons, which, had they not had those little parcels of land to apply themselves to, would have betaken themselves to trades, or to civil, or military, or ecclesiastical employments, neglecting those opportunities, wholly applied themselves to those small divisions of lands; whereby they neglected the opportunities of greater advantage of enriching themselves and the kingdom. . . .

So that without question, by little and little, almost generally in all counties of England (except in Kent, who were

most tenacious of their old customs in which they gloried, and some particular feuds and places where a contrary usage prevailed), the generality of descents or successions, by little and little, *as well of socage lands as knights service*, went to the eldest son, according to the declaration of King Edward I. in the statute of Wales above-mentioned.

STAT. MERTON (20 HEN. III., 1235), c. 9. To the King's Writ of Bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not, nor could not, answer to it; because it was directly against the common order of the Church. (2) And all the bishops instanted the Lords, that they would consent, that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered that they would not change the laws of the realm, which hitherto have been used and approved.

LIT., § 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collaterall of the whole blood, how farre so ever he be from him in degree, may inherite and have the land as heire to him.

§ 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee-simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is neerer of blood; because it is a maxime in law, that inheritance may lineally descend, but not ascend. Yet, if the son in this case die without issue, and his uncle enter into the land as heire to the sonne (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heire to the sonne, for that he commeth to the land by collateral discent and not by lineall ascent.

§ 4. And in case where the sonne purchaseth land in fee-simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side: but if he hath no heire on the part of his father then the land shall descend to the heires on the part of the mother. But if a man marrieth an inheritrix of lands in fee simple, who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of the mother ought to inherite, and not the heires on the part of the father. And if he hath no heire on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheate. In the same manner it is, if lands descend to the sonne of the part of the father, and he entreth, and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden shall have the land by escheate. And so see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

§ 5. Also, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the lands by descent and not the middle, for that the eldest is most worthy of blood.

§ 6. Also, it is to be understood, that none shall have land of fee simple by descent as heire to any man unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder

brother, or some other his next cosin shall have the same, because the younger brother is but of halfe blood to the elder.

§ 7. And if a man hath issue a sonne and a daughter by one venter and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heire to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

§ 8. And also, where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heire to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heire to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse haeredem*. But if there be 2 brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heire to him, who also dies without issue, now the younger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.

Co. Lit., 13, a. If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherite, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voide, as in the case that *Littleton* putteth in this chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, because there is no such

kind of inheritance, whereof you shall read more in his proper place.

4 GRAY, CAS. PROP., 9. *Canons of Descent*.¹—1. Inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

7. In collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.

2 BL. COM., 202-207. Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*:" the connection

¹ These canons are taken from Blackstone. They have been changed in some important respects by the Inheritance Act (3 & 4 Will. IV., c. 106). The 2d, 3d, 4th, and 7th canons remain unaltered. The 1st has been changed by deriving the descent from the last *purchaser* instead of the person last *actually seised*, and by admitting lineal *ancestors* in default of lineal *descendants*. This latter amendment alters the 5th canon also by preferring lineal ancestors over collaterals. The 6th canon has been changed by admitting the half-blood next after the whole blood in the same degree.—ED.

or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon as in the common law. . . .

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*. . . .

The method of computing these degrees in the canon law which our law has adopted, is as follows: we begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in

which they are related to each other. Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; *viz.*, his own grandfather, the father of *Titius*.

4 KENT. COM., 374. The English law of descents is governed by a number of rules, or canons of inheritance, which have been established for ages, and have regulated the transmission of the estate from the ancestor to the heir, in so clear and decided a manner as to preclude all uncertainty as to the course which the descent is to take. But, in these United States the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself. The laws of the individual States may agree in their great outlines, but they differ exceedingly in the details. There is no entire, though there is an essential uniformity on this subject.¹ . . .

¹ In general it may be said that in the United States descent is traced neither from the person last *actually seised*, nor from the last *purchaser*, but from the person last *entitled*; that primogeniture and the preference of the male over the female descendant has been abolished, all the children or heirs of the same degree, male and female, being entitled to share equally in the inheritance. Representation, however, has been retained in most of the States (see canon 4). Generally, also, the disability of the half-blood has been wholly or partially removed, and ancestors (at least the father and mother) admitted after the lineal descendants and before the collaterals. Illegitimacy is still a bar, though in some of the States bastards inherit from the mother, and in most of the States they become legitimate upon the intermarriage of their parents (N. Y. Laws, 1896, c. 272, § 18).—ED.

CHAPTER II.

DISSEISIN.

BRACTON, 162, 163. But if a disseysine has been made in any of the above ways, the first and principal remedy is of this kind, namely, that he who has been disseysed may reject the spoiler by his own strength if he can, or by strength which he has called in or recalled, provided no interval has elapsed, the disseysine or misdeed being flagrant. . . . But if he can in no way expel him, he must have recourse to the power of a superior that he may be allowed to acquire it peaceably and to use it quietly. Forthwith to repel "force by force" is to do so as soon as it can be known that force has been used, before that he, against whom it has been used, has betaken himself to a contrary act. . . . But we must see what is meant by the term "forthwith," and within what time. But the time is not defined, but it is presumed that he ought to have so much time, as he would have if he were impleaded respecting the property, namely, fifteen days, which right, however, he does not enjoy at present. We must likewise see whether the person disseysed was present or absent at the time of the disseysine, or whether he was himself personally ejected, or his agent or his household, or whilst he was absent another person entered into his possession then vacant. I mean vacant corporeally, although not mentally. But if he was present at the time of the disseysine, then let him expel the disseysor immediately and on the same day, if he can. . . . But if he has not chosen such a way, let him do on the morrow or on the third or the fourth day or further with due continuation, what he ought to have done on the first day: because if he could not reject him on the first day, he may be able on the morrow

to rally his forces, to collect arms, and to invoke the aid of friends; but if he has waited for a long time, he seems thereby to dissemble the injury, and thereby altogether to blot it out. . . . But if he has been absent from whatever necessary cause of common business, or of a journey, or from any other cause, it will be requisite to distinguish the distance of places and the times, or the diligence or the negligence of the person disseysed, according as he has been near in the same county, or far off in another county, or elsewhere, provided he is within the realm. Let "far" and "further" be distinguished, at what time he could have known concerning disseysine, and not the time at which he did know it, and in which case reasonable days' journeys are to be computed for him in coming, so that, reasonable delays having been allowed to him, within the fourth day or further upon special cause as above explained he may expel the disseysor, which will be sufficiently immediate, since time does not run against him except from the time of his knowledge, and from which after knowledge he could come conveniently.

STAT. 3 EDW. I. (1275), c. 39. *And forasmuch as it is long Time passed since the Writs undernamed were limited; it is provided, That in conveying a Descent in a Writ of Right, none shall presume to declare of the Seisin of his Ancestor further, or beyond the time of King Richard, Uncle to King Henry, Father to the King that now is; and that a Writ of Novel disseisin, of Partition, which is called Nuper obiit, have their Limitation since the first Voyage of King Henry, Father to the King that now is, into Gascoin. And that Writs of Mortdancestor, of Cosinage, of Aiel, of Entry, and of Nativis, have their Limitation from the Coronation of the same King Henry, and not before. Nevertheless all Writs purchased now by themselves or to be purchased between this and the Feast of St. John, for one Year compleat, shall be pleaded from as long Time as heretofore they have been used to be pleaded.*

STAT. 5 RICH. II. (1381), c. 7. And also the King defendeth, That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. (2) And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

LIT., § 279. And note that disseisin is properly where a man entreth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.

§ 448. Freehold in law is, as if a man disseiseth another, and dieth seised, whereby the tenements descend to his sonne, albeit that his sonne doth not enter into the tenements, yet hee hath a freehold in law, which by force of the discent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shal be endowed.

§ 385. Discents which toll entries are in two manners, to wit, where the discent is in fee, or in fee taile. Discents in fee which toll entries are, as if a man seised of certaine lands or tenements is by another disseised, and the disseisor hath issue, and dieth of such estate seised, now the lands descend to the issue of the disseisor by course of law, as heire unto him. And because the law cast the lands or tenements upon the issue by force of the discent, so as the issue commeth to the lands by course of law, and not by his owne act, the entrie of the disseisee is taken away, and he is put to sue a writ of *entrie sur disseisin* against the heire of the disseisor, to recover the land.

§ 414. Continuall claim is where a man hath right and title to enter into any lands or tenements whereof another is seised in fee, or in fee tail, if hee which hath title to enter makes continuall claime to the lands or tenements before the

dying seised of him which holdeth the tenements, then albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heire, yet may he who hath made such continuall claime, or his heire, enter into the lands or tenements so descended, by reason of the continuall claime made, notwithstanding the discent. As in case that a man bee disseised, and the disseisee makes continuall claime to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heire, yet may the disseisee enter upon the possession of the heire, notwithstanding the discent.

§ 415. In the same manner it is, if tenant for life alien in fee, hee in the reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continuall claime made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heire, then cannot he in the reversion nor hee in the remainder enter. But if hee in the reversion or in the remainder, who hath cause to enter upon the alienee, make continuall claime to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time.

§ 419. The second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach as neere to the tenements as hee dare for such doubt, and by word claime the lands to bee his, presently by such claime he hath a possession and seisin in the lands, as well as if hee had entred in deed, although hee never had possession or seisin of the same lands or tenements before the said claime.

Co. Lit., 253, b. Here is to be observed, that there be two manner of entries, viz., an entry in deed, and an entry

in law. An entry in deed is sufficiently knowne. An entry in law is when such a claime is made as is here expressed, which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon such an entry in law an assise doth lie, as well as upon an entry in deed, and such an entry in law shall avoid a warranty.

LIT., § 422. And if his adversary who occupieth the land dieth seised in fee, or in fee taile, within the yeare and a day after such claime, whereby the lands descend to his sonne as heire to him, yet may hee which make the claime enter upon the possession of the heire, &c.

§ 423. But in this case after the yeare and the day that such claime was made, if the father then died seised the morrow next after the yeare and the day, or any other day after, &c., then cannot hee which made the claime enter; and therefore if hee which made the claime will be sure at all times that his entrie shall not be taken away by such discent, &c., it behoveth him that within the yeare and the day after the first claime made, to make another claime in forme aforesaid, and within the yeare and the day after the second claime made, to make the third claime in the same manner, and within the yeare and the day after the third claime to make another claime, and so over, that is to say, to make a claime within everie yeare and day next after everie claime made during the life of his adversarie, and then at what time soever his adversarie dieth seised, his entrie shall not be taken away by any discent. And such claime in such manner made is most commonly taken and named Continuall Claime of him which maketh the claime.

2 BL. COM., 195-199. A title is thus defined by Sir Edward Coke:¹ *Titulus est justa causa possidendi id quod nostrum est*: or, it is the means whereby the owner of lands hath the just possession of his property.

¹ Inst. 345.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the actual possession be lost, yet he has still remaining in him the right of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right

of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now, by the common law the heir hath obtained an apparent right, though the actual right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law: for, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favored the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services; and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of, viz.:

III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of

the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right*. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit his heirs, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by showing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it in order to recover the lands. Lastly, if by accident, neglect or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that

of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession* and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent right of possession*; but I still retain the *actual right* both of *possession* and *property*. If I acquiesce for thirty years without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right* or *right of property*. And hence it will follow that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if a tenant in tail infeoffs *A.* in fee-simple, and dies, and *B.* disseises *A.*; now *B.* will have the *possession*, *A.* the *right of possession*, and the issue in tail the *right of property*: *A.* may recover the possession against *B.*; and afterward the issue in tail may evict *A.*, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A complete title to lands, tenements and hereditaments. For it is an ancient maxim of the law that no title is completely good unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta,¹ *juris et*

¹ L. 3, c. 15. § 5.

seisinæ conjunctio, then, and then only, is the title completely legal.

DIGBY, HIST. REAL PROP., Ch. II., § 9. By seisin is meant, as has already been pointed out, possession as of freehold, that is, the possession which a freeholder could assert and maintain by appeal to law. There was in fact no other kind of legal possession known at this early time. In later times the word seisin comes to be distinct from possession, the latter being applicable to the possession of a leaseholder or copyholder, the former being confined to the possession of a freeholder. It should, however, be observed that it was by no means necessary for a person to be seised as of right. There was a seisin as of right, and a seisin as of wrong. If the rightful freeholder was ousted and in fact lost his possession, he was disseised or put out of seisin, and the wrongdoer or disseisor was seised in his place, holding by wrong the estate from which he had ousted the rightful possessor. He had in fact a "defeasible title," and for many purposes acts done by him held good as if he had been rightfully seised. A person so seised by wrong was of course liable to be turned out by the rightful owner either by actual entry upon him, or by process of law. A complicated system of rules grew up as to the circumstances and conditions under which this right of actual entry existed, when it ceased, and when the only remedy was by calling in aid the action of the tribunals.

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In the great majority of cases when litigation arose as to the right to land, it would be sufficient to decide which of the two litigants had the right of immediate actual possession; or rather, whether the plaintiff could make out a right to the possession as against the person actually in possession. It was comparatively seldom necessary to have recourse to the higher remedy of a writ of right in order to decide which of the two had the greater right to the land. These possessory actions, as the former class were called, must be

brought within a fixed period, and different limits were from time to time assigned:

The writ of Assize of mort d'ancestor was perhaps instituted by the ordinance called the Assize of Northampton, A.D. 1176, and was applicable only to the particular case where, upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, some person other than the lawful heir had entered upon the land. If the demandant could prove that the ancestor died seised "in his demesne as of fee," and that he (the demandant) was the right heir, the result of the decision of these points in his favor would be the establishment of the right of the demandant to the possession as against the tenant. Similar writs, varied in form to suit the circumstances, and called by different names, were used for the recovery of the possession by a person claiming as heir of a more distant relation. It will be seen from the form of the writ that this proceeding would not be applicable when lands had been devised by will, and therefore after the statutes conferring the power of devising lands by will this remedy was no longer available.

The Assize of novel disseisin was applicable where the demandant himself had been turned out of possession. . . . If successful, the demandant would in this proceeding recover his possession, and also damages for the injury sustained. This was the usual remedy for the recovery of the possession of lands. In certain cases which need not be here specified, it was necessary to resort to the writ of right. But as a rule all practical purposes were attained by means of one of the forms of action adapted to trying the right of possession. The remedy by the Assizes of mort d'ancestor and novel disseisin was only applicable in particular cases. The remedy for the recovery of possession, applicable to all cases, whether falling under the two classes just mentioned or not, was the writ of entry. The law on this subject (now obsolete) is of far too intricate and complicated a character to be discussed here. The remedy by assize was preferred when applicable, as being more expeditious.

LEAKE, LAND LAW, 56. Disseisin of the tenant of a particular estate disseised or divested all the estates in remainder or reversion, and converted them into mere rights of entry, exercisable in their order of succession. The tenant himself of the particular estate whether for life or for years, having the actual seisin, had it in his power to make a feoffment to another by livery, which effectually conveyed the fee, if it in terms imported to do so, irrespectively of his own estate or interest; and such feoffment disseised all the estates in remainder or in reversion dependent upon his seisin and converted them into rights of entry. . . .

Id., 58-60. An entry on the land within the time allowed by law restored the seisin, and, if made by the tenant of a particular estate, it restored or revested the estates in remainder or reversion, which were dependent upon the same title. Hence a right of entry was sufficient to preserve a contingent remainder. The right of entry, arising upon a disseisin, was lost in certain events; as by the seisin being cast by descent upon the heir of the disseisor, which was technically called a *descent cast*; also by an alienation of the fee by the disseisor to another, which was called a *discontinuance* of the possession. On the other hand, the right of entry might be kept alive against a descent cast by the process of *continual claim*. Where the right of entry was lost there remained a mere right of action, to be prosecuted within certain limits of time in the form of real action provided for the circumstances of the case.

The doctrines concerning rights of entry and of action and the proceedings in real actions were highly technical and elaborate, and formed a large and complicated branch of the law of real property until the amendments of the law made by the statute 3 & 4 W. IV., c. 27. By that statute, s. 36, real actions were abolished, and the action of ejectment was left as the only and the comparatively simple remedy at law for the recovery of the possession of land. By the same statute the right of entry or action is no longer defeated by a *descent cast* or a *discontinuance* (s. 39); and

it is exempted from all other casualties except lapse of time. But it must be prosecuted within twenty years next after the accrual of the right (s. 2); subject to the provisions of the statute in the case of disabilities in the person entitled (ss. 16-19).

N. Y. CODE CIV. PROC., § 365. An action to recover real property, or the possession thereof, cannot be maintained by a party other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of the action.

§ 367. An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time when the right to make it descended or accrued.

N. Y. REAL PROP. LAW, § 225. A grant of real property is absolutely void, if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor. . . .

CHAPTER III.

ESCHEAT AND FORFEITURE.

(a) *Escheat.*

2 BL. COM., 244-246. Escheat, we may remember, was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.

Escheat therefore being a title frequently vested in the lord by inheritance, as being the fruit of a seigniorship to which he was entitled by descent (for which reason the lands escheated shall attend the seigniorship, and be inheritable by such only of his heirs as are capable of inheriting the other), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his own act or agreement), than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by entering on the lands and tenements so escheated, or suing out a *writ of escheat*: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title: and

therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the seigniorship to which they belong, they may vest by either purchase or descent, according as the seigniorship is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,¹ and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct, the inheritance itself must fail: the land must become what the feodal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted. But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta,² "*dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

Id., 251-254. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer inheritable.

Great care must be taken to distinguish between for-

¹ 1 Inst. 215.

² L. 6, c. 1.

feiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seigniorship or lordship paramount: but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more antient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation

and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason. . . .

Hitherto we have only spoken of estates vested in the offender at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting anything for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the lands shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives.

There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up

and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony. But, by the law of England, a man's blood is so universally corrupted by attainder that his sons can neither inherit to him nor to any other ancestors, at least on the part of their attainted father.¹ . . .

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told,² doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I., st. 1, to which this very singular instance still in some degree remains an exception.³

¹ Such was formerly the law with reference to escheat *propter delictum tenentis*. After considerable modifications by statute of the doctrine of attainder, the recent statute 33 & 34 Vict., c. 23, has totally abolished forfeiture and escheat (except when forfeiture is consequent upon outlawry), and provides instead for the appointment of an administrator to the property of the convict, and for the vesting of his property in such administrator during the continuance of his punishment.—*Digby*, Ch. X., § 3 (1).

² Co. Litt. 13.

³ But see Gray, Perpet. §§ 40-51 (pp. 369, 370, *supra*) where this exception is doubted.—ED.

(b) Forfeiture for Crime.

GLANVILL, VII., c. 17. Furthermore, if any one be convicted of felony, or have confessed to felony in open court, he becomes disinherited by the law of the land, and all his land passes to his lord as an escheat. It is to be observed that if any such person holds in chief from our lord the king, then not only his land but also all his movable goods and chattels, in whosoever hands they may be found, shall be seised for the benefit of our lord the king, and the heir of such person shall not be entitled to recover any of them. But if a person, holding of any one other than the king, is outlawed or is convicted of felony, then too all his movable property shall belong to the king. His land too shall remain for one year in the hands of our lord the king, but after the lapse of a year the same land shall revert to the rightful lord, that is to say, to him whose fee it is, nevertheless with buildings thrown down and trees rooted up. And speaking generally so often as any one has done anything or made any confession in court by reason of which he has by the judgment of the Court been disinherited, his inheritance reverts as an escheat to the lord of the fee of whom it is held.

MAGNA CARTA (1217), c. 32. We will not hold the lands of them that be convict of felony but one year and one day, and then those lands shall be delivered to the lord of the fee.

4 BL. COM., 381. By attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards

to the time of the treason committed : so as to avoid all intermediate sales and incumbrances, but not those before the fact : and therefore a wife's jointure is not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of statute, 5 & 6 Edw. VI., c. 11. And yet the husband shall be tenant by the courtesy of the wife's lands, if the wife be attainted of treason : for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits ; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands : for he never was attainted of treason.

Id., 385. In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life ; and after his death all his lands and tenements in fee-simple (but not those in tail) to the crown, for a very short period of time : for the king shall have them for a year and a day, and may commit therein what waste he pleases ; which is called the king's *year, day, and waste*. Formerly the king had only liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows and cutting down their woods. . . . But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the First, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit : and therefore *Magna Carta* provides that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee ; without any mention made of waste. But the statute 17 Edw. II. *de praerogativa regis* seems to suppose that the king shall have his year, day *and* waste ; and not the year and day *instead of* waste. Which Sir Edward Coke (and the author of the Mirror, before him)

very justly look upon as an encroachment, though a very ancient one, of the royal prerogative. This year, day and waste are now usually compounded for; but otherwise they regularly belong to the crown; and after their expiration the land would have naturally descended to the heir (as in gavelkind tenure it still does), did not its feudal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attainted as a felon. They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

2 KENT COM., 386. Forfeiture of estate and corruption of blood, under the laws of the United States, and including cases of treason, are abolished. Forfeiture of property, in cases of treason and felony, was a part of the common law, and must exist at this day in the jurisprudence of those States where it has not been abolished by their constitutions, or by statute. Several of the State constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate, except during the life of the offender;¹ and some of them have taken away the power of forfeiture absolutely, without any such exception. There are other State constitutions which impliedly admit the existence or propriety of forfeiture by taking away the right of forfeiture expressly in cases of suicide and in the case of deodand, and preserving silence as to other cases; and, in one instance,² forfeiture of property is limited to the cases of treason and murder.

¹ Constitutions of Pennsylvania, Delaware, and Kentucky.

² Constitution of Maryland.

U. S. CONST., ART. III., sec. 3 (2). The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

N. Y. PENAL CODE, § 710. A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures to the people of the State in the nature of deodands, or in a case of suicide, or where a person flees from justice, are abolished.

N. Y. CODE CRIM. PROC., § 814. When, upon a bench warrant issued for the apprehension of a person who has pleaded guilty, or against whom a verdict has been rendered, upon an indictment for treason, it is duly returned that the defendant cannot be found, the district attorney of the county may apply to the court in which the conviction was had for judgment for outlawry.

§ 818. If the defendant appear, judgment must be rendered against him upon the conviction. If he do not appear, the court, upon proof of the due publication of the order, must render judgment that the defendant be outlawed, and that all his civil rights be forfeited.

§ 819. The defendant is thereupon deemed civilly dead, and forfeits to the people of this State during his life-time, and no longer, all freehold estate in real property, of which he was seised in his own right, at the time of committing the treason, or at any time thereafter, and all his personal property.

N. Y. CODE CIV. PROC., § 1977. Whenever the attorney general has good reason to believe that the title to, or right of possession of, any real property, has vested in the people of the State, by escheat, or by conviction or outlawry

for treason, he must commence an action of ejectment, to recover the property.

(c) *Forfeiture for Waste.*

STAT. MARLBOROUGH (52 Hen. III., 1267), c. 23, sec. 2. Also Fermors, during their Terms, shall not make Waste, Sale, nor Exile of House, Woods, and Men, nor of any Thing belonging to the Tenements that they have to ferm, without special License, had by Writing of Covenant, making mention that they may do it; which Thing if they do, and thereof be convict, they shall yield full Damage, and shall be punished by Amerciament grievously.

STAT. GLOUCESTER (6 EDW. I., 1278), c. 5. It is provided also, That a Man from henceforth shall have a Writ of Waste in the Chancery against him that holdeth by Law of *England*, or otherwise for Term of Life, or for Term of Years, or a Woman in Dower. (2) And he which shall be attainted of Waste, shall lose the Thing that he hath wasted, and moreover shall recompense thrice so much as the Waste shall be taxed at.

CO. LIT., 53, a. An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or gardian in chivalry, by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands, meadows, &c., or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz., voluntary or actuall, and permissive. Wast may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten. But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it

downe, it is wast unlesse he reedifie it againe. Also if glasse windowes (tho' glased by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot, benches, doores, windowes, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *quod non fecit vastum*, but the speciall matter.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste. If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his comming in, and fall downe, the tenant may build the same againe with such materials as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger than it was. If the house be discovered by tempest, the tenant must in convenient time repaire it.

53, b. If the tenant suffer the houses to be wasted, and then fell down timber to repaire the same, this is a double wast. Digging for gravell, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravell or clay for the reparation of the house, as well as he may take convenient timber trees. It is wast to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the

meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly, by the rage or violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, this is no wast punishable. So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable. If the tenant convert arable land into wood or *e converso*, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the proove of his evidence. The tenant may take sufficient wood to repaire the walls, pales, fences, hedges, and ditches as he found them; but he can make no new: and he may take also sufficient plowbote, firebote, and other housebote. The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and imployes them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house: burning of the house by negligence or mischance is waste. . . .

No person shall have an action of wast, unlesse he hath the immediate state of inheritance. . . .

N. Y. CODE CIV. PROC., § 1651. An action for waste lies against a tenant by the curtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do. . . .

§ 1655. If the plaintiff recovers in an action for waste, . . . the final judgment must award to him treble damages. Where the action is brought by the person next entitled to the reversion, and it appears, in like manner, that the injury to the estate in reversion is equal to the value of the tenant's estate or unexpired term, or that it was done maliciously, the final judgment must also award to the plaintiff the forfeiture of the defendant's estate, and the possession of the place wasted.

(d) *Forfeiture for Breach of Condition.*

Co. Lit., 251, a, b. It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record.

In pais, of lands and tenements which lie in livery . . . where a greater estate passeth by livery, than the particular tenant may lawfully make, whereby the reversion or remainder is devested, as here in the example that *Littleton* putteth when tenant for life alieneth in fee, which must bee understood of a feoffment, fine or recoverie by consent. If tenant for life, and hee in the remainder for life in *Littleton's* case, hath joyned in a feoffment in fee, this had beene a forfeiture of both their estates, because hee in the remainder is *particeps injuriae*. And so it is if hee in the remainder for life had entred, and disseised tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder.

A particular estate of anything that lies in grant, cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowson, rent, common, or of a reversion or remainder of land, by deed grant the same in fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may passe; and of that opinion is *Littleton* in our bookes.

2 BL. COM., 152. Estates upon condition implied in law¹ are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*,

¹ For forfeiture for breach of express conditions, see pages 300-315, *supra*.—ED.

both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises, also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.

Upon the same principle proceed all the forfeitures which are given by law of life-estates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz., that they shall not attempt to create a greater estate than they themselves are entitled to.¹ So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feodal donation.

4 KENT. COM., 82-84. Estates for life were, by the common law, liable to forfeiture, not only for waste, but by alienation in fee. Such an alienation, according to the law

¹ See pages 255, 263, *supra*.—ED.

of feuds, amounted to a renunciation of the feudal relation, and worked a forfeiture of the vassal's estate to the person entitled to the inheritance in reversion or remainder. Alienation by feoffment, with livery of seisin, or by matter of record, as by fine or recovery, of a greater estate than the tenant for life was entitled to, by divesting the seisin, and turning the estate of the rightful owner into a right of entry, operated as a forfeiture of the life estate, unless the person in remainder or reversion was a party to the assurance. But an alienation for the life of the tenant himself did not work any wrong; and, therefore, says Lord Coke,¹ it was not within the statute of Gloucester. So, a mere grant or release by the tenant for life, passed, at common law, only what he might lawfully grant. In Massachusetts, Connecticut, New York and Pennsylvania, this feudal notion of forfeiture is expressly renounced, and the doctrine placed upon just and reasonable grounds. Any conveyance by a tenant for life, or years, of a greater estate than he possessed, or could lawfully convey, passes only the title and estate which the tenant could lawfully grant.² It is, therefore, an innocent conveyance, whatever the form of the conveyance may be, and produces no forfeiture of the particular estate. It does not, like a feoffment with livery at common law, ransack the whole estate and extinguish every right and power connected with it.

The same conclusion must follow from the general provision in the statute of Virginia, of December, 1783, and from the forms of conveyance in use in other States. A conveyance in fee by a tenant for life, by bargain and sale, or by lease and release, does not work a discontinuance. Conveyances under the *Statute of Uses* are innocent conveyances, since they operate only to the extent of the grantor's right and occasion no forfeiture. . . .

LEWIN, TRUSTS, 821. At law a tenant for life might, until

¹ 2 Inst. 309.

² New York Revised Statutes, Vol. I., 739, secs. 143, 145.

a modern statute,¹ by certain tortious acts, as by a feoffment of the fee-simple, have forfeited his estate to the remainderman; but had an *equitable* tenant for life affected to dispose of the equitable fee, no forfeiture would have accrued, for nothing passed beyond the grantor's actual interest. By the act above referred to all conveyances are now innocent, that is, they pass nothing but what the grantor can lawfully part with.

N. Y. REAL PROP. LAW, § 212. A conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant can lawfully convey.

¹ 8 & 9 Vict., c. 106, s. 4.

CHAPTER IV.

MARRIAGE.

Co. Lit., 351, *a*. Here it is good to be seene what things are given to the husband by marriage. First, it appeareth here by *Littleton* that if a man taketh to wife a woman seised in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to worke a remitter, and yet the estate which the husband gaineth dependeth upon uncertaintie, and consisteth in privitie; for if the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felonie be committed after issue had. Also, if the husband be attainted of felonie, the king gaineth no freehold, but a pernancie of the profits during the coverture, and the freehold remaineth in the wife. Secondly, if she were possessed of a terme for yeares, yet he is possessed in her right; but he hath power to dispose thereof by grant or demise; and if he be outlawed or attainted, they are gifts in law.

Upon an execution against the husband for his debt, the sheriffe may sell the terme during her life, but the husband can make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it in his life, yet it is a gift in law unto him if he doe survive his wife; but if he make no disposition, and die before his wife, she shall have it againe. And the same law is of estates by statute merchant, statute staple, *elegit*, wardships, and other chattels realls in possession. But if the husband charge the chattell reall of his wife, it shall not binde the wife if shee survive him.

Id., 273, *b*. If a feme covert be tenant for life, a release to the husband and his heires is good, for there is both privity

and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement; for by the enter-marriage he gaineth a freehold in his wife's right.

LIT., § 592. Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, *vis.*, where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the same lands or tenements, but hee may not enter into them because of such an alienation, &c.

§ 594. Also, if a man be seised of land as in right of his wife, &c., and thereof infeoffe another, &c., and dieth, the wife may not enter, but is put to her action, the which is called, *cui in vita*, &c.

Co. LIT., 326, a. "*En droit sa feme, &c.*" That is to say, in fee-simple, fee-taile, or for life. Here *Littleton* putteth another case where a man is seised in *auter droit*, and may make a discontinuance, as the husband seised in the right of his wife, and therefore the common law gave her a *cui in vita*, and her heire a *sur cui in vita*, because they could not enter. But this is altered since our author wrote, by the statute of 32 H. 8, by the purview of which statute the wife and her heires after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

I WMS. SAUNDERS, 253. *And the said Margaret, being so seised of the reversion aforesaid . . . the said Margaret afterwards, at Southwald aforesaid, took to her husband Christopher Took gent. by virtue whereof the said Christopher and Margaret were seised of the said reversion in their demesne as of fee in right of her the said Margaret.*

This is the correct way of pleading the seisin of husband and wife where the estate belongs to the wife in fee. They are both seised in right of the wife; and therefore if the husband pleads that he *alone* is seised in his demesne as of

freehold or as of fee, in right of his wife, it will be bad upon a special demurrer. Thus, where in covenant the declaration stated that *W. S.* was seised in fee, and being so seised, granted the lease on which the action was brought, and upon his death the reversion descended upon *J.*, the plaintiff's wife as heir at law, whereupon the plaintiff became and was, seised of the said reversion in his demesne as of freehold in right of the said *J.* his wife. The court, upon a special demurrer shewing for cause that it ought to have been alleged, "*that the plaintiff and his wife were seised in their demesne as of fee in right of the wife,*" were of opinion, that the way of pleading pointed out by the demurrer, was the only proper and formal one. Doug. 329, *Polyblank v. Hawkins*. So in 2 Lutw. 1422, 1425, *Catlin v. Milner*, where it is stated that the husband alone was seised in his demesne as of fee in right of his wife, it was held not to be good pleading; for they are both seised in right of the wife; and so are all the precedents.—*Williams' note*.

WILLIAMS, REAL PROP. (17th ed.), 352-355. At common law, by the act of marriage, the husband and wife became in law one person, and so continued during the coverture or marriage. The wife was, as it were, merged in her husband. Immediately upon marriage, therefore, the husband became entitled to the whole of the rents and profits which might arise from his wife's lands, and acquired a freehold estate therein, during the continuance of the coverture; and, in like manner, all the goods and personal chattels of the wife, the property in which passed by mere delivery of possession, at once belonged solely to her husband. For by the ancient common law, it was impossible that the wife should have any power of disposition over property for her separate benefit, independently of her husband. The husband also acquired by marriage a seisin of all his wife's freeholds, jointly with her. If, however, the husband had issue by his wife born alive, that might by possibility inherit the estate as her heir, he became entitled to an estate, after

the wife's death, for the residue of his own life in such lands and tenements of his wife as she was solely seised of in fee simple or fee tail in possession. The husband, while in the enjoyment of this estate, was called a tenant by the *curtesy* of England, or more shortly, tenant by the curtesy.¹ . . .

The husband could dispose of the estate which he took during coverture or by the curtesy in lands belonging to his wife at common law, without her concurrence; and it was subject to his debts in his lifetime either upon execution of a judgment against him, or on his bankruptcy. But he could make no lawful disposition of her freehold estates to endure beyond his own interest. So that, if his wife survived him, she resumed her right to her freehold estates, which could not be defeated by his debts or alienations. And if he survived her, her estates in fee simple or tail descended to her heir, if she were the purchaser, or to the heir of the purchaser, if she had become entitled by descent, subject only to the husband's estate by the curtesy, if he had become entitled thereto. For the incapacity, under which a married woman labored at common law, not only hindered her from making any separate disposition of her lands in her lifetime, but also prevented her from devising them by her will. . . .

Id., 359. In modern times, however, if property of any kind were vested in trustees, in trust to apply the income *for the separate use* of a woman during any coverture, present or future, the trust for the separate use of the wife might be enforced in equity. That is, the Courts of Equity obliged the trustees to hold for the sole benefit of the wife, and prevented the husband from interfering with her in the disposal of such income; she consequently enjoyed the same absolute power of disposition over it as if she were sole or unmarried. . . .

Id., 363-367. The capacity of wives with regard to property was completely altered by the Married Women's Prop-

¹ The marital estates of *Curtesy* and *Dower* have been considered elsewhere. See pp 263-278, *supra*.

erty Act, 1882. . . . By this Act, a married woman is capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. . . .

A wife may now dispose during coverture of her statutory separate property, whether real or personal, by the same means by which a single woman may transfer property of the like nature. She may therefore convey any legal estate of freehold, which is her separate property, by deed of grant, without the necessity of acknowledgment or of her husband's concurrence. . . .

. . . A man's capacity for disposing of his own estates in land remains unchanged by the act of marriage; and during a husband's life, the law does not give to the wife any control over his powers of disposition or any interests in the rents and profits of his land. After her husband's death, however, a widow becomes in some cases entitled to a life interest in part of her late husband's lands. This interest is termed the dower of the wife. . . .

N. Y. L., 1860, c. 90, sec. 1. The property, both real and personal, which any married woman now owns, as her sole and separate property, which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this State owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent.

WILLIAMS, REAL PROP. (17th ed.), 374-377. . . .
The legislation in New York, to which reference has been

made, places the married woman, so far as her real property is concerned, and the same is true as to her personalty, substantially in the situation of a *feme sole*. The common-law estate during coverture no longer exists. She controls and conveys her realty as she sees fit, and the husband is not required to join in her transactions in order to give them validity.

From 1848 to the present the work of legislative change in regard to the property rights of married women, both real and personal, has been steadily going on in the different States of the Union. In some the steps have been taken boldly, and the change has probably been as sweeping as that in the State of New York; in others, timidity has characterized the movement, and many of the common-law disabilities still remain. The general tendency everywhere, however, has been to enlarge greatly the wife's freedom of action in regard to her separate property. . . .

The wife's separate estate in equity has been quite generally recognized in this country, but more especially in the Southern States. See *Steel v. Steel*, 1 Ired. Eq. (N. C.) 452. . . . It has received full recognition in the State of New York. See *Jaques v. The Methodist Episcopal Church*, 17 Johns. 548. . . . The effect of the acts in regard to the property rights of married women has been to change the wife's equitable right to hold a separate estate into a legal estate. See *Wood v. Wood*, 83 N. Y. 575. But the jurisdiction of equity can still undoubtedly be invoked whenever it becomes necessary to apply to that tribunal for the protection of the wife's separate property interests.—*Hutchins' note*.

CHAPTER V.

OCCUPANCY.

2 BL. COM., 258-260. Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur*.

This right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass: and was extended only to a single instance: namely, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy.

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly was supposed so to do;

for he had parted with all his interests, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute a remnant as this: it did not belong to the grantee, for he was dead: it did not descend to his heirs, for there were no words of inheritance in the grant: nor could it vest in his executors, for no executors could succeed to a freehold. Belonging therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands: for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi*. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man and his heirs during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*: as having a special exclusive right by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety, and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II., c. 3, which enacts (according to the ancient rule of law) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts: the other, that of 14 Geo. II., c. 10, which enacts that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy by the heir-at-law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes, there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined), so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not create a residue, on purpose to give it to either. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

N. Y. REAL PROP. LAW, § 24. An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee; after his death it shall be deemed a chattel real.

CHAPTER VI.

CUSTOM AND PRESCRIPTION.

BRACTON, 220. . . . Servitudes can be made to appertain to any land by voluntary grant or reservation on the part of the owners. They may also appertain to a tenement without a grant by long and peaceable user uninterrupted by any hindrance interposed, and permitted to continue by parties who are on the spot, all which amounts to assent. Hence it follows that although a servitude may not be reserved or granted in express words, by the owners of the soil, nevertheless if there has been any user extending over any considerable time, exercised in peace, without any interruption, and not by violence or stealth, or by virtue of a request, which is the same thing as by favor, the person enjoying the right cannot be ousted of it, at all events without the judgment of a court; but if the servitude be enjoyed by violence, the disseisor will never acquire the right by reason of the length of time for which it has been enjoyed, although it may be that through the negligence of the person ousted the right may be acquired by long and peaceful and uninterrupted possession, under the eyes of the parties; though it is otherwise in the absence of the parties; and a seisin so obtained can be interrupted in many different ways. And if the seisin be clandestine—that is to say, in the absence of the owners, or without their knowledge, and if they would have been likely to forbid it if they had known—it ought not to be of any avail, although the bailiffs of the land may have assented to or winked at it. Moreover, if it was due to a mere act of grace and favor

which may be revoked in season and out of season, no right is acquired by lapse of time; no more than in the case last mentioned.

LIT., § 170. And note, that no custome is to bee allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of mind, &c., and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of King *Richard*, the first after the Conquest, as is given by the statute of *Westminster* the first, for that a writ of right is the most high writ in his nature, that may be. . . . And others have said that well and truth it is, that seisin and continuance after the limitation, &c., is a title of prescription, as is aforesaid, and by the cause aforesaid. But they have sayd, that there is also another title of prescription, that was at the common law before any estatute of limitation of writs, &c., and that it was, where a custome, or usage, or other thing, hath beene used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome. Hee shall say, that such custome hath beene used from time whereof the memory of men runneth not to the contrary, that is as much to say, when such a matter is pleaded, that no man then alive hath heard any prooffe of the contrary, nor hath no knowledge to the contrary; and insomuch that such title of prescription was at the common law; and not put out by an estatute, *ergo*, it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. *Ideo quaere de hoc*.

2 BL. COM., 263-266. And, first, the distinction between custom and prescription is this: that custom is properly a *local* usage, and not annexed to a *person*; such as a custom

in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held to be a lawful usage); this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*: but if the tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath: which last is called prescribing in a *que estate*.¹ And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII., c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made.

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. For a man shall not be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title, a title by

¹ *Quem statum*, "which estate," *i. e.*, "whose estate" he hath.—ED.

corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed

by prescription; for they arise from private contingencies, and not from any matter of record. 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common in *gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal.

DIGBY, HIST. REAL PROP., Ch. III., § 18 (1). With regard to the origin of servitudes, or the modes in which they may be acquired, Bracton correctly lays down the two modes which have always been recognized, *grant* (*dominorum constitutio*) and *prescription* (*usus*). Feoffment with livery was confined to granting freehold estates over land. It was not applicable to the class of rights in land under consideration. Hence the other principal mode of creating rights was adopted, namely, writing under seal, and it became a principle that for the creation of a servitude (easement or profit) a grant by deed was necessary.

The other mode of acquiring servitudes is, according to Bracton, *per longum usum continuum et pacificum*. The user must have been as of right, not violent, or clandestine, or permissive. These principles, borrowed from the Romans, took root in our law. Only, as time went on, the notion of prescription underwent a change. Long enjoyment of a right was not considered, as was the case in the Roman system, and as Bracton's language here implies, as itself a positive mode of acquisition, but only as evidence that at some period the owner of the soil had created the right in question by a lost or forgotten deed.

Id., Ch. X., § 1. Before the passing of the Prescription Act¹ this mode of acquiring rights *in alieno solo* was regarded exclusively as a species of title by grant, differing only from an express grant in the evidence by which it was established. If it be proved that the right has been in fact enjoyed as far back as memory can trace it, and no origin of the right be shown, the presumption is that it has been enjoyed from time immemorial, that is, from some period anterior to the first year of Richard I., the time at which legal memory commences, and that it was created before that period by the owner of the soil. And even if the right were shown to have been created within the time of legal memory, juries were directed, when the right was in question, to presume that as a fact the right had been expressly granted by the owner of the soil, and that the grant had

¹ 2 & 3 Will. IV., c. 71.

been lost. This mode of supporting rights was felt to be most unsatisfactory, and at length the Prescription Act was passed, by which a perfect title to easements and profits is conferred upon persons who have enjoyed them as of right continuously for certain periods of time specified in the Act. Its provisions are somewhat complicated, but the practical effect is that the enjoyment of an easement, as, for instance, of a way or of the access of light and air through a window for twenty years, and the enjoyment of a profit à *prendre*, as, for instance, of pasturage on a common, for thirty years, works the acquisition of the right. The enjoyment must, except in the case of light, be by a person claiming right thereto, hence it may be defeated by showing that it has been enjoyed avowedly in exercise of some continuing permission or authority of the owner of the soil.

B. UNDER MODERN STATUTES.

I. Voluntary Alienation.

CHAPTER I.

UNDER THE STATUTE OF USES.

DIGBY, HIST. REAL PROP., Ch. VII., § 2. The Statute of Uses at once produced important effects upon the old modes of conveying the legal estate in lands. It has been already seen what were the appropriate modes of conveying freehold estates at common law. If the freehold was to pass immediately from the grantor to the grantee, feoffment with livery of seisin was the only appropriate mode. In practice the same result was accomplished by the fictitious processes of fines and recoveries. It has also been seen under what circumstances the Chancellor would before the Statute have held that the party taking by the common law conveyance would hold to the use, not of himself, but of the grantee or some other person. Wherever, with certain exceptions to be hereafter noticed,¹ such a construction would before the Statute have been put upon the conveyance by the Chancellor—wherever a use would have been raised in favor of some person other than the feoffee or grantee at common law, by reason either of an express declaration of the use, or of circumstances from which the intention of raising the use would necessarily have been inferred, in all such cases after the Statute the legal state passed to the person in whose favor the use was declared or implied.

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The distinction made in the text-books between the rais-

¹ Active trusts, trusts of leasehold interests, and uses upon uses. See page 165, *supra*.

ing of a use by a conveyance operating by transmutation of possession, and raising a use without transmutation of possession, has already been noticed.¹ In the former case a mode of conveyance is employed sufficient at common law to take the estate out of the donor and to vest it in the donee. To this conveyance is superadded, either by express words or by necessary implication, the obligation upon the donee to hold to the use of the donor or of some third person, or of the donor together with some third person

Uses are raised without transmutation of possession when the legal owner of lands binds himself to hold the lands for the use of some other person. It has already been seen that the usual mode of effecting this before the Statute was by bargain and sale, or covenant to stand seised.² In these cases the use, which before the Statute was raised in favor of the covenantee or bargainee, is now executed by the Statute, and thus these two assurances take their places as modes of conveying the legal interest in lands. Thus *A.* covenants to stand seised for *B.* his eldest son and his heirs, or in consideration of £100 bargains and sells his lands to *C.* and his heirs. *B.* and *C.* by force of the Statute take an estate in fee simple in precisely the same way as if that estate had been conveyed to them respectively by feoffment at common law.

LEAKE, LAND LAW, 108. Upon principles of equity any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specifically enforced in the Court of Chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale*. . . .

An agreement unsupported by a valid consideration, or a

¹ See page 139, *supra*.—ED.

² See page 139, *supra*.—ED.

mere declaration of use without transfer of possession, was altogether void of effect in raising a use within the statute by reason of the principle that equity will not enforce gratuitous, or, as they are called, voluntary agreements. And, in general, no distinction was admitted in equity in this respect by reason of the agreement or declaration being made in the form of a covenant or by deed under seal; although in law such formality supplied the force of a consideration. But the value or amount of the consideration paid was immaterial; the existence or expression of it was sufficient to denote that the transaction was intended by way of bargain and not as a mere voluntary agreement; and if not a voluntary agreement, it was effectual to raise a use by way of bargain and sale.

An exception to the general rule of equity not to enforce voluntary agreements was made in the case of a covenant or declaration by deed executed by the person seised to stand seised to the use of his wife, child, or some blood relation. The *motive* then stood in place of a consideration, and it was said to be made upon a *good* consideration, as distinguished from a consideration of money or value, which formed the characteristic of a bargain and sale. A *covenant to stand seised to uses* was thus a recognized mode of raising uses in family settlements.

DIGBY, HIST. REAL PROP., Ch. VII., § 2. One of the immediate effects of the Statute was, as has been seen, to give legal validity and effect to "bargains and sales." These transactions required no particular ceremony, no open or notorious act, such as livery of seisin; and thus one of the great objects of the Statute, the prevention of secret conveyances, would have been eluded. This was at once perceived by the legislature, and in the same year a second Act was passed intended to prevent the mischief of secret bargains and sales by providing for their enrolment in one of the superior courts or before the *custos rotulorum* of the county in which the lands were situate.

STAT. 27 HEN. VIII. (1535), c. 16. *Statute of Enrolments*.—Be it enacted by the authority of this present parliament, that from the last day of July, which shall be in the year of our Lord God 1536, no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing, indented, sealed, and enrolled in one of the King's Courts of Record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold lie or be, before the *Custos Rotulorum* and two Justices of the Peace, and the Clerk of the Peace of the same county or counties, or two of them at the least, whereof the Clerk of the Peace to be one; and the same enrolment to be had and made within six months next after the date of the same writings indented. . . . And that the Clerk of the Peace for the time being, within every such county, shall sufficiently enrol and engross in parchment the same deeds or writings indented as is afore-said, and the rolls thereof at the end of every year shall deliver unto the said *Custos Rotulorum* of the same county for the time being, there to remain in the custody of the said *Custos Rotulorum* for the time being, amongst other records of every of the same counties where any such enrolment shall be so made, to the intent that every party that hath to do therewith may resort and see the effect and tenor of every such writing so enrolled.

DIGBY, HIST. REAL PROP., Ch. VII., § 3. An examination of the language of the Statute [of Enrolments] shows that its provisions only extend to prevent any estate of *inheritance* or *freehold* being created without the observance of the prescribed forms. The Statute therefore did not extend to the creation of a term of years to arise by way of bargain and sale out of an estate of freehold. If *A.*, tenant in fee simple,

bargained and sold his lands to *B.* for ten years, there was no necessity for any enrolment, or even for any writing to evidence the transaction. The Statute of Uses at once operated upon the bargain and sale; one person, the bargainor, was seised to the use of another, the bargainee, and there was no necessity for enrolment, inasmuch as the bargain and sale did not purport to create an estate of inheritance or freehold.

After a time an ingenious conveyancer bethought him of availing himself of a bargain and sale as a secret mode of conveying freehold interests in lands, thus avoiding the necessity of any livery of seisin or of enrolment. It was after some doubt at length held by the Court of Wards¹ that a bargain and sale for a term of years gave to the lessee by force of the words of the Statute of Uses "possession" of his term as if he had actually entered on the land, at all events for the purpose of being capable of taking by a simple deed a release of the reversion.² Thus if *A.*, tenant in fee simple, bargained and sold the manor of Dale to *B.* for a year, and the day after executed a release of the reversion in fee to *B.* and his heirs, he would by the bargain and sale have immediately vested in him an estate for a year in possession. He would thereupon become capable of taking a release, and so soon as the release was executed, the smaller estate and

¹ In the 18th of James I., *Lutwidge v. Mitton*, Croke's Reports, James, 604.

² "Where one by indenture, in consideration of money, bargaineth and selleth, demiseth and granteth land for years, and the next day after, by indenture reciting that grant and demise, grants the reversion to divers uses, the lessee attorns, it is a good grant of the reversion, although there were not any proof that the bargainee entered before this grant of the reversion, or that the bargainor waived the possession; for the lessee shall be adjudged in actual possession by the statute of 27 Hen. 8, c. 16, of uses, and the reversion is immediately divided from the possession, and he hath a good reversion; but in case of a lease for years at the common law, until the lessee enters, or the lessor waive the possession, the reversion is not divided, nor passeth by the words of 'grant of a reversion.'"—*Per Curiam in Iseham v. Morrice*, 3 Cro. Car. (1629), 110.

the larger would coalesce, and the term be "merged" or sunk in the larger estate, whereupon *B.* would become tenant in fee simple in possession.

WILLIAMS, REAL PROP. (17th ed.), 236-238. This bargain and sale for a year, followed by a release, is the modern conveyance by *lease and release* . . . and although the efficiency of this method was at first doubted, it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease as it is called) for a year derived its effect from the Statute of Uses; the release was quite independent of that statute, having existed long before, and being as ancient as the common law itself. The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee-simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter. . . .

SUG. GILB. USES, 232. A conveyance by lease and release is, like a bargain and sale and covenant to stand seised, what

is termed an innocent conveyance. It will not, therefore, create a discontinuance or operate as a forfeiture or destroy a contingent remainder, although it may exclude a contingent remainder by uniting the particular estate with the reversion. —*Sugden's note.*

4 KENT. COM., 494-496. *Of Lease and Release.*—This is the usual mode of conveyance in England because it does not require the trouble of enrolment. . . . It was the mode universally in practice in New York until the year 1788. The revision of the statute law of the State at that period, which re-enacted all the English statute law deemed proper and applicable, and which repealed the British statutes in force in New York while it was a colony, removed all apprehension of the necessity of enrolment of deeds of bargain and sale, and left that short, plain and excellent mode of conveyance to its free operation. The consequence was, that the conveyance by lease and release, which required two deeds or instruments instead of one, fell immediately into total disuse and will never be revived.

Of Bargain and Sale.—This is the mode of conveyance most prevalent in the United States, and it was in universal use in New York after 1788, and prior to the introduction of the *grant* by the *Revised Statutes*, in January, 1830. . . . Nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale.

N. Y. REAL PROP. LAW, § 211. Deeds of bargain and sale, and of lease and release may continue to be used; and are to be deemed grants, subject to all the provisions of law in relation thereto.

CHAPTER II.

MODERN STATUTORY FORMS.

WILLIAMS, REAL PROP. (17th ed.), 232. In modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and for every such transaction, two deeds were always required. . . .

Id., 238. This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the Act was passed to which we have before referred.¹ This act provided that every deed of release of a freehold estate, which should be expressed to be made in pursuance of the act, should be as effectual as if the releasing party had also executed, in due form, a lease for a year, for giving effect to such release, although no such lease for a year should be executed.

In the year 1845 it was provided by the Act to amend the law of real property that after the 1st of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to *lie in grant* as well as in livery. We have seen that, at common law, corporeal hereditaments were said to lie in livery, as being transferable by delivery of possession; while incorporeal hereditaments were said to lie in grant, because a deed of grant was required to convey them, if desired to be transferred apart from the possession of anything corporeal. Since this enactment, therefore, a simple deed of grant has been sufficient for the transfer of all freehold estates in possession, or corporeal hereditaments. And the method so in-

¹ Stat. 4 & 5 Vict., c. 21, repealed as obsolete by Stat. 37 & 38 Vict., c. 96.

troduced of conveying freeholds by deed of grant has ever since superseded all others in practice.

3 WASHBURN, REAL PROP. (5th ed.), 380. Many of the States have prescribed forms of deeds in their statutes; but this has generally been regarded rather as a matter of direction and declaration that such a form would be sufficient, than that it should be required. Most of these statutes, in fact, directly or indirectly refer to the common-law modes as familiar and effectual forms of conveyance. Thus, while the form of deed in common use in Massachusetts is borrowed from the ancient charter of feoffment, modified by a declaration of the uses to which the estate is to be held, the statute expressly refers to "bargain and sale," and "other like conveyance of an estate," and declares that "a deed of quitclaim and release, of the form in common use in this State, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale."¹

Id., 384. It may be said, to sum up the foregoing remarks, that in almost all of the United States a writing which contains a grantor, a grantee, a description of the land or interest therein granted, and words which may be construed to imply a grant by the grantor to the grantee, is a sufficient deed, if executed according to the law of the State where the land is situated. Such a deed is not strictly a deed of feoffment, as no livery of seisin is necessary; nor is it a deed operating by the statute of uses. It is rather a deed resulting from the various statutes which have been from time to time enacted in the various States, and it is substantially and practically the same in all the States. The effect of these statutes is well described in two Maine cases previously cited, in which the court says that, under the statutes of the State, a person owning real estate, having a right of entry on it, whether seised of it or not, may convey such interest, or any part of it, by a deed acknowledged and re-

¹ Mass. Pub. Stat., c. 120, §§ 2, 4.

corded, with such limitations as the grantor pleases, provided they do not violate any rule of public policy.

Thus, in *Wyman v. Brown*,¹ Walter, J., says: "We are also of opinion that effect may be given to such deeds (of a future estate) by force of our own statutes, and independently of the statute of Uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of Uses." . . . This being the case, there seems to be little necessity left for the operation of the statute of Uses, although it is often mentioned by the courts as supporting deeds of future interests. There are, however, cases where the conveyance does not contain suitable words to imply a grant, but does contain words which may fairly imply a covenant or agreement in regard to the title of the land. In such cases, the statute of Uses is still sometimes relied upon to give effect to these deeds as deeds of bargain and sale, or covenant to stand seised. A more effectual and common way of enforcing such instruments, where a valuable consideration has been paid, is to apply to a court of equity to compel a valid legal conveyance of the land. Under the statutes before referred to, the deeds operate as deeds of feoffment; yet livery of seisin is unnecessary, the deed itself vesting the seisin in the grantee.

4 KENT. COM., 301, *note*. Lord Hardwicke is reported to have said, in the course of his opinion, in *Hopkins v. Hopkins* (1 Atk. Rep. 591), that the Statute of Uses had no other effect than to add, at most, three words to a conveyance. This was rather too strongly expressed; but I presume the abolition of uses with us will not have much greater effect. It was the abolition of a phantom. The word *grant* is not more intelligible to the world at large than the words *bargain and sale*; and the fiction indulged for 200 years, that

¹ 50 Me. 139.

the bargain raised a use, and the statute transferred the possession to the use, was as cheap and harmless as anything could possibly be. It would, perhaps, have been as wise to have left the Statute of Uses where it stood, and to have permitted the theory engrafted upon it to remain untouched, considering that it had existed so long, and had insinuated itself so deeply and so thoroughly into every branch of the jurisprudence of real property.

N. Y. REAL PROP. LAW, § 207. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by writing subscribed by the person declaring the same.

LOGAN'S ANN. R. P. L. 62. Parol acts and declarations and gifts may also effect by estoppel a transfer in equity, of the title to real estate, notwithstanding the statutes above cited, particularly if possession is taken and improvements made, and innocent parties are misled by acts or declarations of the owner. *People v. Goodwin*, 5 N. Y. 568.—*Logan's note.*

CHAPTER III.

DEVISE.

LIT., § 167. Also, in some boroughs, by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise he to whome such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the forme and effect of the devise, without any liverie of seisin thereof to be made to him, &c.

CO. LIT., III, *b*. And well said *Littleton*, that lands and tenements were devisable in burghes by custome; for that at the common law no lands or tenements were devisable by any last will and testament, nor ought to be transferred from one to another, but by solemne livery of seisin, matter of record, or sufficient writing; but as *Littleton* here saith, that by certain private customes in some burghes they are devisable. But now since *Littleton* wrote, by the statutes of 32 and 34 H. 8, lands and tenements are generally devisable by the last will in writing of the tenant in fee simple, whereby the ancient common law is altered, whereupon many difficult questions, and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But these statutes take not away the custome to devise, whereof *Littleton* speaketh; for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a

third and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite*, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land; so as it is apparent that the benefit of the lords was more carefully provided for than the good of the heire. . . .

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c., as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force, and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory. But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c., and after devised the residue by his will without any reference to his power by the feoffment, yet this will shall enure to declare the use upon the feoffment because he had no power as owner of the land to devise any part of it. But if the feoffment had been made to the use of his last will, although he deviseth the land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment. All

which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

LIT., § 168. Also, though a man may not grant, nor give, his tenements to his wife during the coverture, for that his wife and he be but one person in the law; yet by such custom he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple, or in fee taile or for tearme of life, or yeares, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c., yet the last devise and will made by him shall stand, and the others are voyd.

2 BL. COM., 373-376. It seems sufficiently clear, that, before the conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feodal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. . . .

However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some antient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feodal restraint on alienations by *deed* vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descent is apparent to the neigh-

borhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert¹ that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable, which might have occasioned a great revolution in the law of devises had not the statute of wills been made about five years after, viz., 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted that all persons being *seised in fee-simple* (except feme-coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements. . . .

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law,

¹ On Devises, 7.

that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor as arises from marriage and the birth of a child.

Id., 378. A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual subscription of the witnesses is not required by law, though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead: but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will. Wherefore no after-purchased lands will pass under such a devise, unless, subsequent to the purchase or contract, the devisor republishes his will.¹

¹ But the statute 1 Vict., c. 26, has abolished this distinction, and all property, of whatever kind, or of which a man is possessed or entitled at

32 HEN. VIII., c. 1, § 1. [Be it enacted]¹ that all and every person and persons, having, or which hereafter shall have, any manors, lands, tenements, or hereditaments, holden in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, by soccage tenure in chief, or of the nature of soccage tenure in chief, nor of any other person or persons by knights service, from the twentieth day of *July* in the year of our Lord God MDXL., shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding.

§ 2. And all and every person and persons, having manors, lands, tenements or hereditaments, holden of the King our sovereign lord, his heirs or successors, in soccage, or of the nature of soccage tenure in chief, and having any manors, lands, tenements or hereditaments holden of any other person or persons in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of *July* in the said year of our Lord God MDXL. shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will and testament in writing, or otherwise, by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any law, statute, custom or other the time of his death, passes by his will: as the instrument now, with reference to the real and personal estate comprised in it, speaks and takes effect as if executed immediately before the testator's death, unless a contrary intention appears by the document itself.—*Kerr*.

¹ The preamble is omitted.

thing heretofore had, made or used to the contrary notwithstanding.

§ 3. Saving alway and reserving to the King our sovereign lord, his heirs and successors, all his right, title and interest of *primer seisin* and reliefs, and also all other rights and duties for tenures in soccage, or of the nature of soccage tenure in chief, as heretofore hath been used and accustomed, the same manors, lands, tenements or hereditaments to be taken, had and sued out of and from the lands of his Highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such and like manner and form, as hath been used by any heir or heirs before the making of this statute; and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the King our sovereign lord in soccage, or of the nature of soccage tenure in chief, whereof there shall be any alteration of freehold or inheritance, made by will or otherwise, as is aforesaid.

§ 7. And be it enacted by authority aforesaid, That all and singular person and persons, having manors, lands, tenements, or hereditaments of estate of inheritance, holden of the King in chief by knights service, and having other manors, lands, tenements or hereditaments holden of the King, or of any other person or persons by knights service, or otherwise, every such person and persons from the said twentieth day of *July* shall have full power and authority to give, dispose, will or assign by his last will in writing or otherwise, by any act or acts lawfully executed in his life, two parts of the same manors, lands, tenements or hereditaments, in three parts to be divided, or else as much of the same manors, lands, tenements or hereditaments, as shall extend or amount to the yearly value of two parts of the same, in three parts to be divided, in certainty and by special divisions, as it may be known in severalty, to and for the advancement of his wife, preferment of his children. payment of his debts, or otherwise at his will and pleasure; any

law, statute, custom, or other thing to the contrary thereof notwithstanding.

29 CAR. II. (1676), c. 3. *Statute of Frauds*.—§ 5. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

7 WM. IV. & 1 VICT. (1837), c. 26. *Wills Act*.—§ 3. And be it further enacted, That it shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all Real Estate and all Personal Estate which he shall be entitled to, either at Law or in Equity, at the Time of his Death, and which if not so devised, bequeathed, or disposed of would devolve upon the Heir at Law, or Customary Heir of him, or, if he became entitled by Descent, of his Ancestor, or upon his Executor or Administrator; and that the Power hereby given shall extend to all Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold . . . and also to Estates *pur autre vie*, whether there shall or shall not be any special Occupant thereof, and whether the same shall be Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether the same shall be a corporeal or an incorporeal Hereditament; and also to all contingent, executory, or other future Interests in any Real or Personal Estate, whether the Testator may or may not be ascertained as the Person or one of the Persons in whom the same respectively may be-

come vested, and whether he may be entitled thereto under the Instrument by which the same respectively were created, or under any Disposition thereof by Deed or Will; and also to all Rights of Entry for Conditions broken, and other Rights of Entry; and also to such of the same Estates, Interests, and Rights respectively, and other Real and Personal Estate, as the Testator may be entitled to at the Time of his Death, notwithstanding that he may become entitled to the same subsequently to the Execution of his Will.

§ 9. And be it further enacted, That no Will shall be valid unless it shall be in Writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

DIGBY, HIST. REAL PROP., Ch. VIII. The operation of a will as a mode of acquiring rights over land is peculiar, and derives from its history attributes wholly different to those which characterize a will of personal or movable property. A will of personalty inherits to some extent the Roman conception of a *successio per universitatem*. It confers on the executor the whole of the testator's rights in respect of his personal property, and the greater portion of his duties. The executor is the universal successor of the testator. To use the language of Roman law, he is invested with the legal character, *persona* or *status*, of his testator, so far as regards his personal property.

On the other hand, the earliest definite juristic conception which was formed of an English will of lands seems to have been, as has already been said, that it operated as a declaration of the testator's intention as to the use or beneficial interest in lands—as, in fact, a conveyance of the particular

beneficial interest intended to be dealt with. Thus a will of lands has always been regarded as a conveyance of a particular interest, coming into operation immediately upon the death of the testator, and not as creating a succession in the sense of Roman law.

It followed from the original conception of a will as a mode of raising a use, that a will, like any other mode of raising uses, might create interests arising at a future time, and divesting previous interests in a way unknown to the common law. These qualities seem to have been imparted even to a devise of lands, which, by virtue of a local custom, was operative at common law. . . . Thus at the time of the passing of the Statute of Uses the conception of a will of lands was that it operated as a declaration of uses, taking effect at or after the testator's death, and being subject to the same rules as regulated the creation of uses by transactions operating *inter vivos*.

These characteristics continued to attach to wills when, by the legislation of Henry VIII, they became recognized as a mode of disposing of the *legal* interest in lands. Just as, before the statutes of Henry VIII, a will of lands had been regarded as a declaration of a use, coming into effect upon the testator's death, but speaking as from its date and dealing only with the interest then intended to be conveyed; so, after those statutes, a will of land operated as a conveyance, dealing with the legal interest possessed by the testator at the date of the will, and intended to be disposed of, but coming into effect only at his death, and being consequently subject to revocation at any time before his death.

WILLIAMS, REAL PROP., 285. Under the Statute of Hen. VIII, a will of lands was regarded in the light of a *present conveyance*, to come into operation at a future time, namely, on the death of the testator. And if a man, having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession, again become subject to his will without a subsequent republication or revival of the

will. But under the Wills Act, no subsequent conveyance shall prevent the operation of the will, with respect to such devisable estate or interest as the testator shall have at the time of his death.¹ In the same manner, the old statute was not considered as enabling a person to dispose by will of any lands, except such as he was possessed of at the time of making his will: so that lands purchased after the date of the will could not be affected by any of its dispositions, but descended to the heir at law. This also is altered by the Wills Act, which enacts² that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. So that every man may now dispose, by his will, of all such landed property, or real estate, as he may hereafter possess as well as that which he now has. Again, the result of the old rule, that a will of lands was a present conveyance, was, that a general devise by a testator of the residue of his lands was, in effect, a specific disposition of such lands and such only as the testator then had, and had not left to any one else. A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. The consequence of this was, that if any other persons to whom lands were left died in the lifetime of the testator, the residuary devisee had no claim to such lands, the gift of which thus failed; but the lands descended to the heir at law. This rule is altered by the Act, under which,³ unless a contrary intention appeared by the will, all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

¹ Stat. 7, Will. IV. and 1 Vict., c. 26, s. 23.

² Stat. 7, Will. IV. and 1 Vict., c. 26, s. 24.

³ 7 Will. IV. and 1 Vict., c. 26, s. 25.

4 KENT COM., 504. The English law of devise was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient. Lands may be devised by will in all the United States; and the statute regulations on the subject are substantially the same, and they have been taken from the English statute of 32 Hen. VIII. and 29 Charles II.

N. Y. 2 R. S., 56, § 1. All persons, except idiots, persons of unsound mind and infants, may devise their real estate by a last will and testament, duly executed according to the provisions of this title.

§ 2. Every estate and interest in real property descendible to heirs may be so devised.

§ 5. Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death.

II. Involuntary Alienation.

CHAPTER I.

IN FAVOR OF CREDITORS.

(a) *Early Forms of Transfer.*

2 BL. COM., 160-162. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III., c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or

(out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII., c. 6, amended by 8 Geo. I., c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II., c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. . . . At present I need only mention that it is the name of a writ, founded on the statute¹ of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce than for any other consideration. Before the statute of *quia emptores*,² it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2 permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year)³ the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one-half of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by

¹ 13 Edw. I., c. 18.

² See page 61, *supra*.

³ 13 Edw. I.

statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke.¹ "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds" (which makes them an exception to the general rule), "because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*." This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors; because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

DIGBY, HIST. REAL PROP., Ch. V., § 5. *Creditors' Rights*.—No branch of the law is of greater practical importance than that which relates to the rights which creditors gradually acquired of having recourse to the land of their debtors for the payment of their debts. In the first place, the creditor

¹ 1 Inst. 42, 43.

might acquire rights over the debtor's land in consequence of a judicial proceeding either in the ordinary courts of common law, or under the extraordinary jurisdictions created by the Statute of Merchants, 13 Edward I, stat. 3, and the Statutum de Stapulis, 27 Edward III, stat. 2, c. 9. Secondly, a debtor might, without the intervention of any judicial proceedings, give the creditor the security of his land for a debt.

After obtaining a judgment in his favour in an action at common law, the creditor was enabled by one of the provisions of the Statute of Westminster II (13 Edward I, c. 18) to choose whether to have execution upon the goods of the debtor by the writ which is still called the writ of *fiery facias* or to have a writ commanding the sheriff to "deliver to him [all the chattels of the debtor saving only his oxen and beasts of his plough, and] the one half of his land, until the debt be levied upon a reasonable price or extent." This power of the creditor to seize and sell half the debtor's land is now extended to the whole. The writ by which this is effected has ever since the Statute of Westminster II been called the writ of *elegit*.

The Statutes Merchant and Staple were designed to give creditors who were merchants a speedier and more effectual mode of proceeding to recover debts than was afforded by the common law. The merchant creditor was empowered to summon his debtor before the "Mayor of London or before some chief warden of a city or of another good town where the king shall appoint," and obtain from him an acknowledgment or recognizance of the debt and of the day at which it would become due. This acknowledgment was then formally drawn up, and if the debt was not paid it might be enforced against the person and property of the debtor. As to the debtor's lands, "the merchant shall have such seisin of the lands and tenements delivered unto him or his assigns that he may maintain a writ of novel disseisin if he be put out, and of redisseisin also as of freehold, to hold to him and his assigns until the debt be paid." It

should be observed that these remedies by *elegit* and statute merchant bound the lands from the date of the judgment in the former case, and of the recognizance in the latter.

(b) *Execution.*

4 KENT COM., 428-434. *Of Title by Execution.*—This species of title owes its introduction to modern statutes, and it was unknown to the common law. The remedy given to the judgment creditor by the English law was a sequestration of the profits of the land by writ of *levari facias*, or the possession of a moiety of the lands by the writ of *elegit*, and, in certain cases, of the whole of it by *extent*. In all these cases, the creditor holds the land in trust until the debt is discharged by the receipt of the rents and profits. This limited remedy against the real estate of the debtor was not deemed sufficient security to British creditors, in its application to the American colonies; and the statute of 5 Geo. II., c. 7, was passed, in the year 1732, for their relief. It made lands, hereditaments, and real estate, within the English colonies, chargeable with debts, and subject to the like process of execution as personal estate. Lands were dealt with on execution, precisely as personal property. . . .

The practice of selling real estate under certain checks and modifications, created to prevent abuse and hardship, has been continued and become permanently established. The general regulation, and one prevalent in most of the States, is to require the creditor to resort, in the first instance, to the personal estate as the proper and primary fund, and to look only to the real estate after the personal estate shall have been exhausted and found insufficient. . . .

The right to sell real estate on execution reaches reversionary interests, and they are bound by the judgment. But in many of the States, the lands, after being taken by execution, are to be duly appraised by commissioners, or a sher-

iff's inquest, and set off, and possession delivered to the creditor in the execution, by metes and bounds; and they operate as a conveyance of the debtor's title, and a payment on the judgment to the amount of the valuation. The return of the officer when recorded passes the title. The debtor is likewise allowed a reasonable time to redeem. This is the case in Maine, New Hampshire, Vermont and Massachusetts; and the debtor is allowed a year to redeem, except in Vermont, where it is only six months. . . .

In those States in which the sheriff sells the land, instead of extending it to the creditor, he executes a deed to the purchaser; and it is held, that the sheriff's sale is within the statute of frauds, and requires a deed, or note in writing, of the sale, signed by the sheriff. . . . In the New England States, with the exception of Rhode Island, the sheriff's official return of the proceedings under the execution, constitutes the title of the creditor, as does the sheriff's return of the inquisition upon the *elegit* in England; and no deed is executed, for the title rests upon matter of record. In New York every judgment and final decree are a lien on the real estate of the debtor from the docketing of the same, and affect equally his after-acquired lands.

(c) *Bankruptcy.*

ARCHBOLD, BANKRUPTCY (10th ed., 1844), 216. The general rule is that all property of the bankrupt real and personal in possession, remainder, reversion, or in action merely, to which he was entitled at the date of the act of bankruptcy, or afterward, is vested in the assignees by virtue of this appointment; and his acts thenceforth with reference to this property are considered, to all intents and purposes, as the acts of a stranger.

46 & 47 VIC. (1883), c. 52. *The Bankruptcy Act.*—
§ 20. Where a receiving order is made against a debtor,

then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this act, within fourteen days after the conclusion of the examination of the debtor, or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

LOVELAND, BANKRUPTCY (1899), 283. The property of the bankrupt, whatever it may be, remains in the bankrupt until a trustee is appointed and qualified. Thus, where no trustee is appointed the title of the bankrupt is not divested. . . . The title of the bankrupt in the interval between the adjudication and the appointment of the trustee is defeasible, and when the trustee is appointed is divested as of the date of the adjudication of bankruptcy. During this period the bankrupt occupies a sort of fiduciary relation to his creditors. All titles derived under and through the bankrupt, originating during this interval, are, by force of law and without regard to the knowledge or motive of the claimant, defeated by the appointment of a trustee.

The trustee . . . upon his appointment and qualification is vested by operation of law, without a deed of conveyance, with the title of the bankrupt as of the date he was adjudged a bankrupt. B. A., 1898, sec. 70, *a*.

CHAPTER II.

FOR PUBLIC PURPOSES.

DIGBY, HIST. REAL PROP., Ch. X., § 3 (3). There are certain modes of acquiring land by what may be called a process of involuntary alienation, where the law provides means for depriving a person of his property upon proper compensation being made to him, and vesting it in other persons, or in a corporation, notwithstanding any opposition by the owner. Thus the legislature provides machinery for compelling persons to divest themselves of lands which may be required for certain purposes of public utility; for instance, a railway, public elementary schools, or certain public works. This is principally effected by the machinery provided by the Lands Clauses Consolidation Act.¹ This act contains a set of general provisions, which are usually incorporated in the special acts authorizing and regulating individual undertakings, providing for a mode of compulsorily vesting the property required in the company or other body undertaking the public works by the giving certain notices, and taking the requisite steps to assess and pay the proper compensation for the lands taken.

LEWIS, EM. DOM., § 1. Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the general welfare. It embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being de-

¹ 8 Vict., c. 18.

voted to some particular use, either by the State itself or by a corporation, public or private, or by a private citizen. . . .

§ 2. . . . *Sixth.* The State may deprive a person of his property, or of some right or interest therein, for the purpose of appropriating the same, or making it subservient, to particular uses. Thus private property is taken and held by the State, or vested in public corporations, for the public use, as in the case of highways, canals, parks, public buildings and the like; or private corporations, or individuals, are authorized to institute proceedings for the purpose of compelling a transfer of property to themselves, to be devoted to some particular use, either of a public nature, such as railroads, turnpikes, etc., or of a private nature, such as private ways, mills and the like.

The acts which are described and included under this last division are universally spoken of as pertaining to the eminent domain. All other exercises of power over private property, and every species of right in, and control and regulation over, property of a public nature, may properly be referred . . . to some other of the sovereign powers of the State. Therefore, eminent domain is properly limited in its application to the appropriation by a sovereign State of private property to particular uses, as the public welfare demands. . . .

§ 3. There has existed and still exists among jurists a difference of opinion as to the nature of the power of eminent domain. Some maintain that it is a kind of reserved right, or supereminent estate or interest in all property vested in the sovereign power. . . .

We conclude . . . that eminent domain is not of the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require, and which pertains to sovereignty as a necessary, constant and inextinguishable attribute.

18 WEND. (N. Y.), 57. Whether this principle be denominated the right of transcendental propriety, or of eminent domain, or, as is more properly by Grotius, the force of supereminent dominion, it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This principle or right does not rest, as supposed by some, upon the notion that the state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation that it may be resumed, and all individual rights to it extinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which, however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is entirely the creation of its individual owners; and yet the principle of appropriating private property to public use is full as extensive in regard to personal as to real property.—*Per* Tracy, Sen., in *Bloodgood v. M. & H. R. R. Co.* (1837).

U. S. CONST. AMDTS., ART. 5. . . . [No person shall] be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.¹

¹ The provision of the New York Constitution (Art. I. § 6) is in the same terms.—ED.

C. ESTOPPEL.

LIT., § 599. But by the feoffment of tenant in taile, fee simple passeth by the same feoffment by force of the liverie of seisin, &c.

§ 600. But by force of a release nothing shall passe but the right which he may lawfully and rightfully release, without hurt or dammage to other persons who shall have right therein after his decease, &c. So there is great diversitie betweene a feoffment of tenant in taile and a release made by tenant in taile.

§ 609. For if I lett land to a man for terme of his life, &c., and the tenant for life letteth the same land to another for terme of years, &c., and after my tenant for life grant the reversion to another in fee, and the tenant for yeares attorne, in this case the grantee hath in the freehold but an estate for terme of the life of his grantor, &c., and I which am in the reversion of the fee simple may not enter by force, of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but alwayes remaines unto me, as it was before, notwithstanding such grant of the reversion, made to the grantee, to him and to his heires, &c., because nothing passed by force of such grant, but the estate which the grantor hath, &c.

§ 610. In the same manner is it, if tenant for terme of life by his deed confirme the estate of his lessee for yeares, to have and to hold to him and his heires, or release to his lessee and his heires, yet the lessee for yeares hath an estate but for terme of the life of the tenant for life, &c.

Co. LIT., 330, *b*. Here is rehearsed another ancient maxime of the common law touching grants; and hereby it ap-

peareth that a feoffment in fee (albeit it be by *parol*) is of a greater operation and estimation in law, than a grant of a reversion by deed, though it be inrolled, and attornment of the lessee for yeares of a release or a confirmation by deed, for the reasons aforesaid. . . .

LIT., § 611. But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for yeares may make a feoffment in fee, and by his feoffment the fee simple shall passe, and yet he had at the time of the feoffment made but an estate for terme of yeares, &c.

§ 618. And note, that of such things as passe by way of grant, by deed made in the countrie, and without livery, there such grant maketh no discontinuance, as in the cases aforesayd, and in other like cases, &c. And albeit such things bee graunted in fee, by fine levied in the king's court, &c., yet this maketh not a discontinuance, &c.

CO. LIT., 332, *a*. Here is the generall reason yeelded of the precedent cases and the like; for that it is a maxime in law, that a grant by deed of such things as doe lie in grant, and not in liverie of seisin, doe worke no discontinuance. But the particular reason is, for that of such things the grant of tenant in taile worketh no wrong, either to the issue in taile, or to him in reversion or remainder; for nothing doth passe but onely during the life of tenant in taile, which is lawfull, and every discontinuance worketh a wrong as hath beene said.

WILLIAMS, REAL PROP., 178. The delivery of possession which always took place in a feoffment, rendered it an assurance of great power; for the law permits one who has obtained actual possession of land to maintain it against all others, except those who may lawfully claim the land under a prior title. If, therefore, a person shall have made a feoffment to another of an estate in fee simple, or of any other

estate, not warranted by his own interest in the lands, such a feoffment would have operated (as it was said) *by wrong*. That is to say, it would have conferred on the feoffee the whole estate limited by the feoffment, and would have enabled him to maintain the seisin actually delivered to him against all but those whose prior title was displaced by the feoffment. And even they were in certain cases deprived of all right to enter upon the land, and left with nothing but a right to bring an action for its recovery. Thus if a tenant in tail or for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong. In the case of a tenant for life, who has no fee and whose position in early times was that of lessee rather than owner, such a feoffment was held to be a cause of forfeiture to the person next entitled after his death; as being a conveyance of such person's interest to another without his consent. But a feoffment by tenant in tail conferred an estate indefeasible during his life. At the present day, however, an estate by wrong can no longer be created by feoffment; an act of 1845 providing that a feoffment shall not have any tortious operation.

STAT. 8 & 9 VICT. (1845), c. 106, § 4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation; . . . and the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law in respect of any tenements or hereditaments. . . .

N. Y. REAL PROP. LAW, § 210. . . . A greater estate or interest does not pass by any grant or conveyance than the grantor possessed or could lawfully convey at the time of the delivery of the deed. . . .

RAWLE, COV. FOR TITLE, § 241. "An estoppel by deed," says Mr. Bigelow, . . . "may be defined in a strict

sense to be a right based upon a preclusion against the competent parties to a valid sealed instrument and their privies to deny its force and effect by any evidence of inferior solemnity."

§ 242. This was the ordinary and personal effect of an estoppel by deed. But it had also a much higher operation, which was in certain and exceptional cases actually to transfer and pass an estate; so that if a man conveyed to another land to which he had no title, any after-acquired title would inure to the latter by direct operation of law, and become vested in him in the same manner as if it had originally passed to him by the assurance.

§ 243. Now it must be carefully observed that by the common law there were two classes of cases in which an estate thus actually *passed* by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine or a common recovery. Such was their solemnity and high character that they always passed an *actual* estate, by right or by wrong, and as against the feoffor or conusor and his heirs, not only divested them of what they then had, but of every estate which they might thereafter by possibility acquire, and this doctrine has been applied in modern times. The second was where the assurance was by lease, under which, it will be remembered, estates could take effect *in futuro*; and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties—the same contract which on the part of the lessor implied a covenant for quiet enjoyment from the word *demise*, and on the part of the lessee implied a covenant for payment of the rent from the words *yielding and paying*.

§ 244. These modes of assurance were *the only ones* by which an after-acquired title was actually *passed by direct operation of law* under the doctrine of estoppel. Thus a grant or a release had not this effect. They only operated upon the estate which the grantor or releasor actually had, "and therefore if a man grant a rent charge out of the manor

of Dale, and in truth he hath nothing in that manor, and after he purchases the manor, yet he shall hold it discharged,"¹ and this applied equally to a release. And as the conveyances in use at the present day—which take effect by virtue of the statute of Uses, and which as distinguished from feoffments, fines, and common recoveries were called "innocent conveyances," viz., deeds of bargain and sale, lease and release, etc.—pass no more than the actual estate of the party, they have of course no greater effect by way of estoppel than the common law grant or release.

§ 245. Where, however, it has distinctly appeared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive, reciprocally, a certain estate, they have obviously been held to be personally estopped from denying the operation of the deed according to this intent.

§ 246. There was then an ordinary and an extraordinary effect attached to an estoppel. The one was personal in its character, like the rebutter in a warranty, and estopped the grantor and his heirs from doing or alleging anything contrary to the tenor and effect of his sealed instrument. This effect, however, was purely personal as against him or them; the remedy being sometimes enforced in a court of law and for the avoiding of circuitry of action by reason of breach of covenant, and more frequently in equity, by further assuring to the grantee the estate which had thus been *intended* to be conveyed. But it never operated to pass an estate by direct operation of law. The other—the extraordinary—effect possessed the high function of *actually transferring* every estate, present or future, vested or contingent, to the feoffee, conusee, or lessee, according as the mode of assurance employed was a feoffment, a recovery, a fine, or a lease, and this effect was peculiar to them alone, there being no authority in any of the English books to show that it was produced by any other species of conveyance.

¹ Perkins, tit. Grant, § 65.

§ 247. This sketch of some of the principal features of the doctrine of estoppel by deed has thus been made as introductory to an important class of cases which, on this side of the Atlantic, has given to some of the modern covenants for title, and especially to the covenant of warranty, the function just referred to, which is properly attributable only to the effect of an estoppel in its highest sense.

The history of the law on this side of the Atlantic is this. It was decided in two early cases in New York that where one by deed of bargain and sale, or lease and release, conveyed land to which he had no title, he was estopped by his deed from claiming any after-acquired estate in it.¹ It does not appear in the report of the cases whether the deeds did or did not contain covenants for title; but the decisions were rested on the authority of familiar cases decided upon fines and leases.

But this doctrine, which was unsupported by early authority, was soon after abandoned, and it was held by the same court, reversing the cases referred to, that where one conveyed land to which he had no title, by deed of bargain and sale containing no covenants for title, nor intention on the face of the deed that the grantee expected to become invested with a certain estate, a subsequently acquired title would not inure to the benefit of the grantee, even as against the grantor and his heirs. This decision has been almost consistently followed, and a large class of cases both in New York and throughout the United States has established the conclusion that as a general rule, and apart from the doctrine of estoppel caused by recital, in order that an after-acquired estate should pass by estoppel, it is necessary that the deed should contain covenants of some sort or kind. And while it is true that an intention—shown by recital, averment, or otherwise, that a certain definite estate was intended to be conveyed—will generally be allowed the same effect as though it were a covenant, yet it is considered that the presence of a covenant is perhaps the strongest evidence that

¹ *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Murray*, 12 Johns. 201.

such was the intention and the contract of the parties. But a mere release, or a deed of quit-claim, will not have the effect of estoppel.

§ 248. Where, however, the deed does contain such recital or averment, and more especially where it contains certain of the covenants for title, it has been held by a large class of cases that as a general rule any after-acquired estate will inure, by virtue of the covenants, to the party claiming under the conveyance and his heirs and assigns *by direct operation of law*, with the same effect to all intents and purposes as if such estate had originally passed by the deed. And in many States, the doctrine has been made the subject of statutory enactment, and the legislation is to a great extent both recent and on the increase.

D. REGISTRATION.

WILLIAMS, REAL PROP., 242. In order to make a complete and unavoidable conveyance of lands situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull), a memorial of the deed of conveyance must be duly registered in the county register. The registration of deeds affecting lands in these counties was rendered necessary by statutes of the reigns of Anne and George II. These acts provided that all deeds should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deeds were duly registered before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee should claim. The Courts of Equity, however, held that a purchaser or mortgagee of land in a register county, who had had clear previous notice of a prior unregistered assurance affecting the same land, and yet registered his own deed before the other, should not be permitted to gain any priority over the persons claiming under the previous assurance with regard to the *equitable* estate in the land; but should hold the *legal* estate which he acquired by priority of registration, as a trustee for such other persons. And this doctrine of equity still prevails with respect to land in Middlesex.

N. Y. 2 R. S., 756, § 1. Every conveyance of real estate, within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good

faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

MASS. PUB. STAT., c. 120, sec. 4. A conveyance of an estate, in fee simple, fee tail, or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person other than the grantor or lessor and his heirs and devisees and persons having actual notice of it, unless it is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated.

103 MASS. REP., 492. The formalities which shall be deemed indispensable to the valid conveyance of land are prescribed and regulated by statute. A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration. No seisin remains in the grantor, and he has literally nothing in the premises which he can claim for himself, transmit to his heir at law, or convey to another person. But when the effect of the deed upon the rights of third persons, such as creditors or *bona fide* purchasers, is to be considered, the law requires something more, namely, either actual notice, or the further formality of registration, which is constructive notice. It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bona fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as

against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or transfer which the statute recognizes as binding on them, or as having any capacity adversely to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent seisin is not divested or affected by any unknown and unrecorded deed that he may have made. Gen. Sts., c. 89, s. 3.—*Per Ames, J., in Earle v. Fiske* (1870).

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